TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 356

THE UNITED STATES OF AMERICA, PETITIONER

vs.

HOME TITLE INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 5, 1931

CERTIORARI GRANTED OCTOBER 26, 1931

(36,170)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 356

THE UNITED STATES OF AMERICA, PETITIONER

vs.

HOME TITLE INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Proceedings in U. S. C. C. A., Second Circuit	1	1
Statement under rule 13, par. 4	1	1
Record from D. C. U. S., Eastern New York	2	1
Summons with notice	2	1
Complaint	3	2
Answer	14	7
Note of issue	20	10
Notice of trial	21	10
Plaintiff's bill of exceptions	22	11
Appearances of counsel	22	11
Agreed statement of facts	24	12
Opinion of the court, Galston, J	43	23
Plaintiff's request for findings	54	29
Amended request for findings of fact	56	30
Defendant's request for findings of fact and conclusions of law	72	40
Motion for judgment on behalf of defendant	73	41
Motion for judgment on behalf of defendant	75	42
Notice of exceptions	77	43
Plaintiff's exceptions to conclusions of law	82	45
Consent to bill of exceptions	84	46
Note re exhibit "A"	85	46
Exhibit "B"—Letter rejecting claims, March 20, 1926	85	47
Notes re exhibits "C" to "J" inc	86	47
Exhibit "K"—Application form for title insurance	88	48
"L"—Policy of title insurance	89	49
"M"—Application form for loan	91	50
"N"—Mortgage guarantee	92	51
"O"—Guaranteed first mortgage certificate	96	53
Notes re exhibits "P" to "Z" inc	98	55
Note re exhibit "YY"	100	56
Notes re Exhibits 1 to 5 inc	100	56

	Original	Print
Record from D. C. U. S., Eastern New York—Continued.		
Order dispensing with printing certain exhibits	102	56
Order for judgment	106	58
Judgment	108	59
Notice and allowance of appeal	109	60
Citation on appeal [omitted in printing]	111	61
Assignment of errors	112	61
Bond on appeal [omitted in printing]	116	63
Order extending time to perfect appeal	122	63
Order settling transcript of record	124	64
Order extending time to perfect appeal	126	64
Stipulation as to record	127	65
Order as to record	127	65
Clerk's certificate [omitted in printing]	128	65
Opinion, Swan, J	129	66
Judgment	134	72
Clerk's certificate [omitted in printing]	136	72
Order allowing certiorari	137	72

1 In United States Circuit Court of Appeals for the Second Circuit

L–3547

HOME TITLE INSURANCE COMPANY, PLAINTIFF-APPELLANT

against

THE UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Statement under rule 13, par. 4

This suit was commenced on April 21, 1928.

The plaintiff is Home Title Insurance Company; the defendant, the United States of America.

Complaint was filed on April 21, 1928.

Answer was filed on June 8, 1928.

Note of issue and notice of trial were filed on May 8, 1929.

Trial was had on February 24, 1930, and April 8, 1930, an adjourned date, before Honorable Clarence G. Galston, without a jury, pursuant to subdivision (20) of section 24 of the Judicial Code (28 U. S. C. A. §41).

Order for judgment dismissing the action was filed on June 24, 1930.

Judgment in favor of defendant was entered on August 16, 1930.

Appeal on behalf of the plaintiff was taken on August 27, 1930.

2 In United States District Court for the Eastern District of New York

L–3547

HOME TITLE INSURANCE COMPANY, PLAINTIFF

against

THE UNITED STATES OF AMERICA, DEFENDANT

Summons with notice

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and file your answer and serve a copy thereof on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Marcus B. Campbell, Robert A. Inch, and Grover M. Moscowitz, Judges of the District Court of the United States for the Eastern District of New York, at the borough of Brooklyn, this 21st day of April, in the year one thousand nine hundred and twenty-eight.

PERCY G. B. GILKES, (Sgd.)
Clerk.

[SEAL.] By J. A. LEAVENS, (Sgd.)
Deputy Clerk.

WEILL, WOLFF & SATTERLEE,
Plaintiff's attorneys.

Office and post-office address, 52 William Street, Borough of Manhattan, New York City, N. Y.

3 *Summons with notice*

NOTICE.

To the defendant within named:

TAKE NOTICE, That upon default judgment will be taken for the sum of $5,386 dollars, in money, with interest on $1,392 from Nov. 1923, on $1,850 from Feb. 1926, on $2,144 from Sept. 1924, besides costs.

WEILL, WOLFF & SATTERLEE,
Plaintiff's Attorneys.

In United States District Court

[Title omitted.]

Complaint

The plaintiff, by Weill, Wolff & Satterlee, its attorneys, complaining of the defendant, alleges:

For a first cause of action

First.—The plaintiff at all times herein mentioned was and now is a domestic corporation, duly organized and existing under
4 and by virtue of the laws of the State of New York, and has its principal place of business at 51 Willoughby Street, in the Borough of Brooklyn, City, County, and State of New York.

Second.—This is a suit of a civil nature at common law and the matter in controversy exceeds, exclusive of interests and costs, the sum of $3,000 and is less than the sum of $10,000, and this suit and the causes of action herein set forth arise under the Constitution of the United States of America and the laws thereof providing for internal revenue.

Third.—The plaintiff has a just claim against the defendant in the sum of $1,392, with interest thereon. Said claim represents an amount erroneously, illegally, and wrongfully collected by the collector of internal revenue for the first district of New York, from the plaintiff, under protest and duress, as an alleged capital stock tax liability of the plaintiff for the year beginning July 1, 1922, under section 1000 of the 1921 act. The Commissioner of Internal Revenue of the United States has at all times wrongfully and unlawfully refused to refund said amount or any part thereof to the plaintiff, although duly demanded, and is so refusing to make refund thereof.

Fourth.—On or about the 26th day of October, 1922, the plaintiff duly made to the Commissioner of Internal Revenue of the United States a capital stock tax return for the year beginning July 1, 1922, under the revenue act of 1921, on the official form prescribed therefor by the Treasury Department and in conformity with the instructions of the said commissioner contained therein.

5 Fifth.—The plaintiff believed it was not subject at the time of making such return to imposition of any capital stock tax by virtue of the fact that it was an insurance company within the meaning of section 246 of the revenue act of 1921 and the exception to the capital stock tax imposed by said act.

Sixth.—The plaintiff subsequently received from the collector of internal revenue for the first district of New York a bill and demand for payment of an alleged capital stock tax liability in the sum of $1,392, which amount the plaintiff, in or about the month of November, 1922, duly paid under protest and duress to the said collector at Brooklyn, New York.

Seventh.—The plaintiff is informed and believes that the defendant has received from the above-mentioned collector in the usual course of his official business and still retains the amount paid by the plaintiff as aforesaid.

Eighth.—On or about February 10, 1926, the plaintiff, in accordance with law, duly filed with the collector of internal revenue for the first district of New York, at Brooklyn, New York, for transmission to the Commissioner of Internal Revenue of the United States, its claim for refund of $1,392, paid by the plaintiff as aforesaid, for the reason stated in said claim:

"That the above company, being an insurance company, is not liable for capital stock tax."

Ninth.—Upon the filing of the above-mentioned claim for refund the plaintiff was entitled, under the provisions of section 281 of the revenue act of 1921 and of section 284 of the revenue act of 1924, to a refund of the amount paid as aforesaid.

6 Tenth.—On or about the 22nd day of April, 1926, the above-mentioned claim for refund was erroneously, illegally, and wrongfully rejected by the defendant through the Commissioner of Internal Revenue.

Eleventh.—Since its organization the plaintiff's business has consisted and now consists of insuring titles to real estate and guaranteeing real-estate mortgages, and in connection with such business and as a part thereof, examining titles to real estate, appraising the value of real estate, and engaging in other activities necessarily incidental thereto.

Twelfth.—Section 1000 of the revenue act of 1921 imposed a special annual excise tax, known as the capital stock tax, upon every domestic corporation with respect to its carrying on or doing business, provided that the tax so imposed should not apply in any year to any insurance company subject to the tax imposed by section 243 or 246 of said act.

Thirteenth.—Sections 243 and 246 of the revenue act of 1921 imposed an annual tax upon the net income of every life-insurance company, for the calendar year 1921 and each taxable year thereafter, and of every insurance company (other than a life or mutual-insurance company) for the calendar year 1922 and each taxable year thereafter, respectively, in lieu of the corporation income tax imposed by section 230 of said act, the excess-profits tax imposed by Title III of the 1921 act, and the aforesaid capital-stock tax.

Fourteenth.—The plaintiff since its organization has been and is an insurance company within the meaning of section 246 of the revenue act of 1921 and the exception to the capital-stock tax imposed by said act.

7 Fifteenth.—There is now due and owing to the plaintiff from the defendant the sum of $1,392, with interest thereon, no part of which has been paid, although payment thereof has been duly demanded.

Sixteenth.—The claimant further avers that it is and has always been the sole owner of the aforesaid claims and has always been the sole owner of the aforesaid claims and has not assigned or transferred the whole or any part thereof, or interest therein, and that it has at all times borne true allegiance to the Government of the United States, and has in no way voluntarily aided, abetted, or given encouragement to rebellion against said Government.

For a second cause of action

Seventeenth.—The plaintiff repeats and reiterates each representation and allegation of the paragraphs of the complaint numbered "First" and "Second."

Eighteenth.—The plaintiff has a just claim against the defendant in the sum of $1,850, with interest thereon. Said claim represents an amount erroneously, illegally, and wrongfully collected by the collector of internal revenue for the first district of New York, from the plaintiff, under protest and duress, as an alleged capital stock tax liability of the plaintiff for the year beginning July 1, 1923,

under section 1000 of the 1921 act. The Commissioner of Internal Revenue of the United States has at all times wrongfully and unlawfully refused to refund said amount or any part thereof to the plaintiff, although duly demanded, and is so refusing to make refund thereof.

8 Nineteenth.—On or about the 3rd day of December, 1923, the plaintiff duly made to the Commissioner of Internal Revenue of the United States a capital stock tax return for the year beginning July 1, 1923, under the revenue act of 1921, on the official form prescribed therefor by the Treasury Department and in conformity with the instructions of the said commissioner contained therein.

Twentieth.—The plaintiff repeats and reiterates each representation and allegation of the paragraph of the complaint numbered "Fifth."

Twenty-first.—The plaintiff subsequently received from the collector of internal revenue for the first district of New York a bill and demand for payment of an alleged capital stock tax liability in the sum of $1,850, which amount the plaintiff in or about the month of February, 1926, duly paid under protest and duress to the said collector at Brooklyn, New York.

Twenty-second.—The plaintiff repeats and reiterates each representation and allegation of the paragraph of the complaint numbered "Seventh."

Twenty-third.—On or about February 10, 1926, the plaintiff, in accordance with law, duly filed with the collector of internal revenue for the first district of New York, at Brooklyn, New York, for transmission to the Commissioner of Internal Revenue of the United States, its claim for refund of $1,850, paid by the plaintiff as aforesaid, for the reason stated in said claim:

"That the above company, being an insurance company, is not liable for capital stock tax."

9 Twenty-fourth.—The plaintiff repeats and reiterates each representation and allegation of the paragraphs of the complaint numbered "Ninth," "Tenth," "Eleventh," "Twelfth," "Thirteenth," and "Fourteenth."

Twenty-fifth.—There is now due and owing to the plaintiff from the defendant the sum of $1,850, with interest thereon, no part of which has been paid, although payment thereof has been duly demanded.

Twenty-sixth.—The plaintiff repeats and reiterates each representation and allegation of the paragraph of the complaint numbered "Sixteenth."

For a third cause of action

Twenty-seventh.—The plaintiff repeats and reiterates each representation and allegation of the paragraphs of the complaint numbered "First" and "Second."

Twenty-eighth.—The plaintiff has a just claim against the defendant in the sum of $2,144, with interest thereon. Said claim represents an amount erroneously, illegally, and wrongfully collected by the collector of internal revenue for the first district of New York, from the plaintiff, under protest and duress, as an alleged capital stock tax liability of the plaintiff for the year beginning July 1, 1924, under section 700 of the 1924 act. The Commissioner of Internal Revenue of the United States has at all times wrongfully and unlawfully refused to refund said amount or any part thereof to the plaintiff, although duly demanded, and is so refusing to make refund thereof.

10 Twenty-ninth.—On or about the 17th day of September, 1924, the plaintiff duly made to the Commissioner of Internal Revenue of the United States a capital stock tax return for the year beginning July 1, 1924, under the revenue act of 1924, on the official form prescribed therefor by the Treasury Department and in conformity with the instructions of the said commissioner contained therein.

Thirtieth.—The plaintiff repeats and reiterates each representation and allegation of the paragraph of the complaint numbered "Fifth."

Thirty-first.—The plaintiff subsequently received from the collector of internal revenue for the first district of New York a bill and demand for payment of an alleged capital stock tax liability in the sum of $2,144, which amount the plaintiff, in or about the month of September, 1924, duly paid under protest and duress to the said collector at Brooklyn, New York.

Thirty-second.—The plaintiff repeats and reiterates each represensentation and allegation of the paragraph of the complaint numbered "Seventh."

Thirty-third.—On or about February 10, 1926, the plaintiff, in accordance with law, duly filed with the collector of internal revenue for the first district of New York, at Brooklyn, New York, for transmission to the Commissioner of Internal Revenue of the United States, its claim for refund of $2,144 paid by the plaintiff as aforesaid, for the reason stated in said claim:

"That the above company, being an insurance company, is not liable for capital stock tax."

11 Thirty-fourth.—The plaintiff repeats and reiterates each representation and allegation of the paragraphs of the complaint numbered "Ninth," "Tenth," and "Eleventh."

Thirty-fifth.—Section 700 of the revenue act of 1924 imposed a special annual excise tax, known as the capital-stock tax, upon every domestic corporation with respect to its carrying on or doing business, provided that the tax so imposed should not apply in any year to any insurance company subject to the tax imposed by section 243 or 246 of said act.

Thirty-sixth.—Sections 243 and 246 of the revenue act of 1924 imposed an annual tax upon the net income tax of every life insurance company for each taxable year and of every insurance company (other than a life or mutual insurance company) for each taxable year in lieu of the corporation income tax imposed by section 230 of said act, Title III of the 1924 act and the aforesaid capital stock tax.

Thirty-seventh.—The plaintiff repeats and reiterates each representation and allegation of the paragraph of the complaint numbered "Fourteenth."

Thirty-eighth.—There is now due and owing to the plaintiff from the defendant the sum of $2,144, with interest thereon, no part of which has been paid, although payment thereof has been duly demanded.

Thirty-ninth.—The plaintiff repeats and reiterates each representation and allegation of the paragraph of the complaint numbered "Sixteenth."

12 Wherefore, plaintiff demands judgment against the United States in the full sum of $5,386, with interest on $1,392 from November, 1922, on $1,850 from February, 1926, and on $2,144 from September, 1924, further averring that it is justly entitled to said amounts from the United States after allowing all just credits and offsets.

WEILL, WOLFF & SATTERLEE,
Attorneys for Plaintiff.

Office & P. O. Address, No. 52 William Street, Borough of Manhattan, New York, N. Y.

13 [*Duly sworn to by Dwight Comstock; jurat omitted in printing.*]

14 In United States District Court

[Title omitted.]

Answer

The defendant, by its attorney, William A. DeGroot, United States attorney for the Eastern District of New York, answering the complaint of the plaintiff herein, alleges:

First.—Admits the allegations contained in paragraph marked "First" of the complaint herein.

Second.—Admits the allegations contained in paragraph marked "Second" of the complaint herein.

Third.—Denies the allegations set forth in paragraph marked "Third" of the complaint herein.

Fourth.—Admits the allegations contained in paragraph marked "Fourth" of the complaint herein.

Fifth.—Denies the allegations contained in paragraph marked "Fifth" of the complaint herein.

Sixth.—Denies the allegations contained in paragraph marked "Sixth" of the complaint herein.

15 Seventh.—Denies the allegations contained in paragraph marked "Seventh" of the complaint herein.

Eighth.—Denies the allegations contained in paragraph marked "Eighth" of the complaint herein.

Ninth.—Denies the allegations contained in paragraph marked "Ninth" of the complaint herein.

Tenth.—Denies the allegations contained in paragraph marked "Tenth" of the complaint herein.

Eleventh.—Admits the allegations contained in paragraph marked "Eleventh" of the complaint herein.

Twelfth.—Admits the allegations contained in paragraph marked "Twelfth" of the complaint herein.

Thirteenth.—Admits the allegations contained in paragraph marked "Thirteenth" of the complaint herein, and begs leave to refer to the statutes upon the trial of this action.

Fourteenth.—Denies the allegations contained in paragraph marked "Fourteenth" of the complaint herein.

Fifteenth.—Denies the allegations contained in paragraph marked "Fifteenth" of the complaint herein.

Sixteenth.—Denies that it has sufficient information or knowledge sufficient to form a belief as to the allegations contained in paragraph marked "Sixteenth" of the complaint herein and therefore denies the same.

16 Seventeenth.—Admits the allegations contained in paragraph marked "Seventeenth" of the complaint herein.

Eighteenth.—Denies the allegations contained in paragraph marked "Eighteenth" of the complaint herein.

Nineteenth.—Denies the allegations contained in paragraph marked "Nineteenth" of the complaint herein.

Twentieth.—Denies the allegations contained in paragraph marked "Twentieth" of the complaint herein.

Twenty-first.—Admits that under date of February 4, 1926, the sum of one thousand eight hundred and fifty ($1,850.00) dollars was paid by the plaintiff to the collector of the first district, at Brooklyn, New York, for capital stock tax liability, but denies each and every other allegation contained in paragraph marked "Twenty-first" set forth.

Twenty-second.—Denies each and every allegation contained in paragraph marked "Twenty-second" of the complaint herein.

Twenty-third.—Denies the allegations contained in paragraph marked "Twenty-third" of the complaint herein.

Twenty-fourth.—Denies the allegations contained in paragraph marked "Twenty-fourth" of the complaint herein, not hereinbefore admitted.

Twenty-fifth.—Denies the allegations contained in paragraph marked "Twenty-fifth" of the complaint herein.

17 Twenty-sixth.—Denies the allegations contained in paragraph marked "Twenty-sixth" of the complaint, not hereinbefore admitted.

Twenty-seventh.—Admits the allegations contained in paragraph "Twenty-seventh" of the complaint herein.

Twenty-eighth.—Denies the allegations contained in paragraph marked "Twenty-eighth" of the complaint herein.

Twenty-ninth.—Admits the allegations contained in paragraph marked "Twenty-ninth" of the complaint herein.

Thirtieth.—Denies the allegations contained in paragraph marked "Thirtieth" of the complaint herein.

Thirty-first.—Denies the allegations contained in paragraph marked "Thirty-first" of the complaint herein.

Thirty-second.—Denies the allegations contained in paragraph marked "Thirty-second" of the complaint herein.

Thirty-third.—Denies the allegations contained in paragraph marked "Thirty-third" of the complaint herein.

Thirty-fourth.—Denies the allegations contained in paragraph "Thirty-fourth" of the complaint herein not hereinbefore admitted.

Thirty-fifth.—Admits the allegations contained in paragraph marked "Thirty-fifth" of the complaint herein and begs leave to refer to the statute upon the trial of this action.

18 Thirty-sixth.—Admits the allegations contained in paragraph marked "Thirty-sixth" of the complaint herein and begs leave to refer to the statute upon the trial of this action.

Thirty-seventh.—Denies the allegations set forth in paragraph marked "Thirty-seventh" of the complaint herein, not hereinbefore admitted.

Thirty-eighth.—Denies the allegations set forth in paragraph marked "Thirty-eighth" of the complaint herein.

Thirty-ninth.—Denies the allegations contained in paragraph marked "Thirty-ninth" of the complaint herein, not hereinbefore admitted.

Wherefore, defendant demands judgment dismissing the complaint of the plaintiff herein, together with the costs and disbursements of this action.

WILLIAM A. DEGROOT,
United States Attorney,
On behalf of defendant.

Room 211, Federal Building, Brooklyn, New York.

19 [*Duly sworn to by Howard W. Ameli; jurat omitted in printing.*]

20 In United States District Court

[Title omitted.]

Note of issue

Weill, Wolff & Satterlee, 52 William Street, New York City, attorneys for the plaintiff.

Howard W. Ameli, acting United States attorney for the eastern district of New York, room 211, Federal Building, Borough of Brooklyn, city of New York, attorney for the defendant.

Issue was joined on June 8, 1928, by the service of an answer herein upon the said attorneys for the plaintiff.

This is an action to recover taxes which were erroneously, illegally, and wrongfully collected by the collector of internal revenue for the first district of New York from the plaintiff under protest and duress as an alleged capital stock tax liability of the plaintiff for the years beginning July 1, 1922, July 1, 1923, and July 1, 1924, whereas in fact, the plaintiff being an insurance company was not liable for the capital stock tax during those years.

The attorneys for the plaintiff request that this cause be added to and placed upon the common law calendar of the United States District Court for the Eastern District of New York for the first Wednesday in June, 1929.

Dated, New York, May 6, 1929.

21 In United States District Court

[Title omitted.]

Notice of trial

Please take notice that the issues of law and fact in the above-entitled cause will be brought on for argument and trial and an inquest taken therein at a trial term of the United States District Court in and for the Eastern District of New York, to be held at the United States courtrooms in the United States post office building, Borough of Brooklyn, City of New York, in the said eastern district of New York, on the 5th day of June, 1929, at 10.30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated, New York, May 6, 1929.

Yours, &c.,

WEILL, WOLFF & SATTERLEE,
Attorneys for Plaintiff.

Office & P. O. Address, 52 William Street, Borough of Manhattan, New York, N. Y.

To the honorable the ATTORNEY GENERAL OF THE UNITED STATES.

To the honorable the ATTORNEY OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

22 In United States District Court, Eastern District of New York

No. L 3547

HOME TITLE INSURANCE COMPANY, PLAINTIFF

against

THE UNITED STATES OF AMERICA, DEFENDANT

Plaintiff's bill of exceptions

NEW YORK, *August 27, 1930.*

The above action was tried before the Hon. Clarence G. Galston, United States District Judge, in his chambers in the post office building, at 10.30 a. m., on February 24, 1930, and in his chambers in the Eagle Building, at 10.30 a. m., on April 8, 1930, tried by the court without a jury, pursuant to subdivision (20) of section 24 of the Judicial Code (28 U. S. C. A. §41).

Appearances of counsel

Messrs. Weill, Wolff & Satterlee, attorneys for plaintiff (by Hugh Satterlee, Esq., of counsel).

Hon. Howard W. Ameli, U. S. attorney, attorney for defendant (by Albert D. Smith, Esq., assistant United States attorney, and E. W. Horton, Esq., attorney, Bureau of Internal Revenue, of counsel).

23 By stipulation between counsel for the plaintiff and counsel for the defendant the above action was submitted to the court on February 24, 1930, upon an agreed statement of facts previously filed with the clerk of the United States District Court for the Eastern District of New York on February 21, 1930.

On February 24, 1930, the plaintiff filed its request for findings of fact and conclusions of law and the defendant filed its motion to dismiss.

Pursuant to adjournment granted by the court when the case was submitted, the trial was continued and concluded on April 8, 1930, at which time decision was reserved and the plaintiff filed its amended request for findings of fact and the defendant filed its request for findings of fact and conclusions of law and motion for judgment.

Under date of June 11, 1930, the court handed down its written opinion adopting the agreed statement of facts herein as the findings of fact, deciding in favor of the defendant and against the plaintiff, and granting the motion for judgment on behalf of the defendant. On June 24, 1930, the court settled an order granting the motion for judgment on behalf of the defendant, theretofore submitted on the trial of the action, and adjudging that the defendant have judgment

against the plaintiff dismissing the action together with costs and disbursements thereof.

On August 13, 1930, the plaintiff filed its notice of exceptions and exceptions to conclusions of law, respectively.

On August 16, 1930, the court entered judgment herein in favor of the defendant and against the plaintiff dismissing the complaint herein on the merits, together with costs amounting to $20.00.

24 In United States District Court

[Title omitted.]

Agreed statement of facts

Now come plaintiff and defendant in the above-entitled cause, by their respective attorneys, whereupon it is stipulated and agreed that the facts hereinafter set forth shall be taken as true as though established by competent evidence taken in open court. Provided, however, that this stipulation shall be without prepudice to the right of either party to introduce further, competent and material evidence at the trial of this case not inconsistent with the facts herein stipulated to be taken as true.

It is requested by the parties hereto that the court, upon the decision of this case, separately state its findings of fact and conclusions of law.

1. This is a suit of a civil nature at common law and the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000, and is less than the sum of $10,000, and this suit and
25 the causes of action set forth in the complaint herein arise under the Constitution of the United States of America and the laws thereof providing for internal revenue.

2. Plaintiff is and at all times herein mentioned was a domestic corporation duly organized and existing under the laws of the State of New York pertaining to title and credit guarantee corporations, namely, Article V of the insurance law of said State of New York (Laws of 1892, chapter 690), its charter or certificate of incorporation having been duly filed in the office of the superintendent of insurance of the State of New York on or about April 5, 1906.

The plaintiff was organized, as aforesaid, with the name of Home Title Insurance Company of New York, but on or about April 15, 1921, its name was changed to Home Title Insurance Company.

A true and correct copy of plaintiff's said charter or certificate of incorporation, with all amendments thereto, is hereto attached and made part hereof as Exhibit A.

3. On or about December 13, 1923, plaintiff filed a capital stock tax return for the period beginning July 1, 1922, and ending June 30, 1923, and the Commissioner of Internal Revenue thereafter audited said return and determined and found the sum of $1,392

as a capital stock tax liability of the plaintiff for said period, which sum he thereafter assessed.

On February 4, 1926, the plaintiff was compelled to pay and did pay, under protest and duress, to the collector of internal revenue for the first district of New York, at Brooklyn, New York, said sum of $1,392, which amount the United States has received from
26 said collector in the usual course of his official business and still retains.

Thereafter, plaintiff, on or about February 10, 1926, duly filed its claim for refund of $1,392 paid by the plaintiff as aforesaid. On or about April 22, 1926, the Commissioner of Internal Revenue of the United States rejected said refund claim and notified the plaintiff of such rejection by letter dated March 20, 1926, a true and correct copy of which is attached hereto and made a part hereof as Exhibit B.

True and correct copies of said capital stock tax return and of said claim for refund are attached hereto and made part hereof as Exhibits C and D, respectively.

4. On or about December 6, 1923, plaintiff filed a capital stock tax return for the period beginning July 1, 1923, and ending June 30, 1924, a true and correct copy of which is attached hereto and made part hereof as Exhibit E.

Thereafter the Commissioner of Internal Revenue determined and assessed the sum of $1,850 as a capital stock tax liability of the plaintiff for the period beginning July 1, 1923, and ending June 30, 1924.

On February 4, 1926, the plaintiff was compelled to pay and did pay, under protest and duress, to the collector of internal revenue for the first district of New York at Brooklyn, New York, said sum of $1,850, which amount the United States has received from said collector in the usual course of his official business and still retains.

On February 10, 1926, the plaintiff duly filed its claim for refund of the $1,850 paid by the plaintiff as aforesaid, a true and correct copy of which is attached hereto and made a part hereof as
27 Exhibit F. On or about April 22, 1926, the Commissioner of Internal Revenue of the United States rejected said refund claim and notified the plaintiff of such rejection by letter dated March 20, 1926, a true and correct copy of which is attached hereto and made a part hereof as Exhibit G.

5. On or about September 18, 1924, plaintiff filed a capital stock tax return for the period beginning July 1, 1924, and ending June 30, 1925, a true and correct copy of which is attached hereto and made a part hereof as Exhibit H.

Thereafter the Commissioner of Internal Revenue determined and assessed the sum of $2,144 as a capital stock tax liability of the plaintiff for the period beginning July 1, 1924, and ending June 30, 1925.

On February 4, 1926, the plaintiff was compelled to pay and did pay, under protest and duress, to the collector of internal revenue for the first district of New York at Brooklyn, New York, said sum of $2,144 which amount the United States has received from said collector in the usual course of his official business and still retains.

On February 10, 1926, the plaintiff duly filed its claim for refund of the $2,144 paid by the plaintiff as aforesaid, a true and correct copy of which is attached hereto and made a part hereof as Exhibit I. On or about April 22, 1926, the Commissioner of Internal Revenue of the United States rejected said refund claim and notified the plaintiff of such rejection by letter dated March 20, 1926, a true and correct copy of which is attached hereto and made a part hereof as Exhibit J.

6. Plaintiff, since the date of its incorporation, has always been, and now is, subject to examination by, and supervision of, the superintendent of insurance of the State of New York, and is, and
28 has always been, subject to all the provisions of the insurance law of the State of New York applicable to so-called title and credit guarantee corporations organized thereunder, and is, and has always been, required to file, and has filed annually with the said superintendent of insurance, on forms approved by him, the statements required by law for each year and as of December 31st of each year.

During the years 1921 to 1925, inclusive, as well as before and after that period, the plaintiff always complied with the insurance law of the State of New York and the regulations of the insurance department of said State.

It is agreed that the court may take judicial notice of said annual statements of plaintiff to said superintendent of insurance as published in his reports as though fully set forth herein.

True and correct copies of plaintiff's annual statements for each of the calendar years 1921 to 1923, inclusive, are set forth in Part III of the New York Insurance Reports for the years 1922 to 1924, respectively, duly made and published under the authority of section 46 of the insurance law of the State of New York.

In its said annual reports to the superintendent of insurance of the State of New York, the plaintiff reported its income, outgo, assets, liabilities, capital, surplus, guaranteed bonds and mortgages, guarantee fund and stock for each of the calendar years 1921 to 1923, inclusive, as follows:

29 *Income statements as reported in New York insurance reports*

	1921		1922		1923	
INCOME						
Premiums for title insurance	$29,090.65		$46,050.18		$67,136.82	
Premiums for mortgage guarantees	90,449.14	$119,539.79	105,750.03	$151,800.21	134,349.66	$201,488.48
Fees for:						
Searches	3,693.77		6,497.46		7,945.91	
Conveyances	13,544.25		26,008.93		27,775.00	
Examinations	479,420.46		733,752.80		813,048.88	
Sundry	4,153.09		5,234.03		7,349.20	
Old accounts collected	9,939.65		2,303.40		2,300.60	
		510,751.22		773,796.62		858,423.59
Interest earned on:						
Mortgage loans	51,840.98		83,942.74		111,040.94	
Bonds and stocks	14,216.05		6,780.08		215.21	
Bank deposits	4,341.45		5,454.26		7,754.72	
Real estate investment	102.39		3,617.08		5,021.57	
Sundry	1,570.00		2,536.50		3,035.50	
		72,070.87		102,330.66		127,067.94
Rents		−2,505.65		863.91		20,997.41
Profit on company's stock sold		850.00				
Gross profit on sale or maturity of:						
Real estate	3,342.47				11.45	
Mortgages						
Bonds	1,410.11		19.37			
Stocks			10.00		300.00	
		4,752.58		29.37		311.45
Decrease in reserve for taxes						8,205.95
Profit on second mortgages						138.30
Cash addition to surplus						
Total income		705,458.81		1,028,820.77		1,216,633.12
Surplus December 31 of preceding year		685,206.67		791,593.12		1,013,519.77
Total		1,390,665.48		1,820,413.89		2,230,152.89
30 OUTGO						
Losses incurred		861.71		2,841.87		7,509.50
Commissions or brokerage		41,078.21		59,751.30		82,641.80
Salaries, fees, and other charges of officers, directors, trustees, and office employees		281,963.78		374,142.80		515,479.01
Rents		15,836.02		21,283.77		24,061.21
Advertising	29,608.43		41,357.33		49,394.72	
Printing and stationery	9,610.91		12,413.80		10,914.28	
Furniture and fixtures	19,412.00		12,737.44		2,184.74	
Postage, telegrams, telephone, and express	6,044.06		7,717.72		9,168.90	
Miscellaneous office expenses	30,870.77		42,466.19		41,480.54	
		95,546.17		116,692.48		113,143.18
Legal expenses		2,724.11		10,331.53		14,188.21
Insurance department licenses and fees				54.03		
All other licenses, fees, and taxes:						
Federal corporations or income tax	27,242.06		48,274.37		52,627.75	
State tax on premiums	1,081.44		1,195.40		460.50	
Sundry	5,182.98		1,139.76		485.44	
		33,506.48		50,609.53		53,573.69
Interest charges incurred:						
Borrowed money	18,129.31		22,111.56			28,235.89
Mortgages	2,004.25		991.75			
		20,133.56		23,103.31		
Accounts charged off		6,090.21		4,654.59		4,982.54
Dividends to stockholders		76,500.00		97,500.00		120,000.00
Book values written off:						
Real estate		4,832.11		3,507.11		13,164.89
Reserve for taxes		20,000.00		5,000.00		
Reserve for losses				37,421.80		
Increase in contingent reserve						152,578.20
Increase in loss reserve						
Real estate expense						26,058.22
Gross loss on sale or maturity of bonds						375.00
Commission on sale of real estate						
Total outgo		599,072.36		806,894.12		1,156,101.34
Surplus end of year		791,593.12		1,013,519.77		1,074,051.55
Total		1,390,665.48		1,820,413.89		2,230,152.89

31 *Balance sheets (December 31) as reported in New York insurance reports*

	1921	1922	1923
ASSETS			
Market value of real estate	$255,098.50	$238,879.94	306,512.30
Mortgage loans	1,054,978.33	1,979,581.70	2,245,167.26
Market value of stocks	436,450.00	288,750.00	370,800.00
Cash in office	1,140.83	2,370.43	20,522.22
Deposit in banks	113,902.64	158,864.16	278,887.89
Fees receivable:			
Search	$1,473.88	$2,287.89	$2,904.80
Conveyances	115.00	215.00	245.00
Examinations	19,390.31	32,375.46	42,972.53
Sundry	2,519.14	2,773.71	2,231.89
	23,498.33	37,652.06	48,354.22
Interest due and accrued:			
Mortgage loans	12,028.26	17,314.63	33,424.23
Bank deposits	636.13		
	12,664.39		
Guaranteed interest due	5,365.37	10,366.93	
Accrued guaranteed interest receivable	330,749.66	432,884.81	548,637.62
Interest due and accrued on mortgages sold	8,319.99	13,014.49	
Documentary revenue stamps	400.00	400.00	2,000.00
Interest prepaid on loans	1,695.83	3,194.43	4,877.84
Total assets	2,242,263.87	3,183,273.58	3,858,243.68
32 LIABILITIES, CAPITAL, AND SURPLUS			
Borrowed money	150,000.00	400,000.00	800,000.00
Incumbrances on company's real estate	32,500.00		
Interest due and accrued	1,070.06	400.25	
Estimated amount of taxes hereafter payable based on business of year of this statement	50,000.00	55,000.00	46,794.05
Premiums, fees, or other items received in advance	28,867.83	33,102.27	54,835.09
Clients' money retained	71,860.54	129,442.57	129,695.22
Accrued guaranteed interest payable	313,832.32	401,536.92	485,781.74
Mortgages sold, not delivered	53,600.00	112,850.00	75,258.50
Interest on above accrued			590.91
Reserve for losses unadjusted		37,421.80	190,000.00
Salaries, expenses, bills, etc., due or accrued			1,227.62
Special trust account			
Subscriptions to new stock			
Total liabilities	701,670.75	1,169,753.81	1,784,192.13
Capital	750,000.00	1,000,000.00	1,000,000.00
Surplus Dec. 31	791,593.12	1,013,519.77	1,074,051.55
Total liabilities, capital, and surplus	2,243,263.87	3,183,273.58	3,858,243.68
Aggregate amount of bonds and mortgages outstanding December 31, payment of principal and interest of which has been guaranteed by this corporation	20,636,027.00	25,933,875.00	32,290,140.00
Sum set apart by company pursuant to requirements of section 176 of insurance law as a guarantee fund	547,100.00	744,000.00	678,000.00

	Par value	Book and market value	Par value	Book and market value	Par value	Book and market value
STOCKS OWNED						
Home Mortgage Investment Co., New York	$96,000.00	$144,000.00				
Hamilton National Bank, New York			$4,000.00	$7,200.00	$10,000.00	$15,000.00
Midwood Trust Co., Brooklyn, N. Y.	194,300.00	291,450.00	187,700.00	281,550.00	260,000.00	363,800.00
Total	290,300.00	435,450.00	191,700.00	288,750.00	270,000.00	378,800.00

33 7. Since its organization, including the years 1921 to 1925, inclusive, the plaintiff's business has consisted of the insurance of titles to real estate and the guaranteeing of real estate mortgages, and said business is and has at all times been carried on by the plaintiff as stated herein.

The plaintiff has at all times refused to guarantee any mortgage with respect to which it did not have full knowledge and over which it did not have complete control.

8. The practice of the plaintiff in the insurance of titles to real estate during the years 1921 to 1925, both inclusive, as well as before and after that period, was as follows:

(1) The plaintiff issued policies of title insurance for which it received fixed charges, collected by plaintiff for each policy when issued, based on a scale dependent upon the amount of the policy. In this connection, solely as preliminary steps thereto, the plaintiff examined and prepared abstracts of titles, made searches and procured information, in relation thereto, to real estate and chattels real.

(2) A person, desiring a policy of title insurance, made written application to the plaintiff for such policy. The plaintiff thereafter made an investigation and search of the records pertaining to the title of the real estate and chattels real in question, and if the title was found to be insurable by the plaintiff, its policy of title insurance was issued as provided in said application. If such title was found by the plaintiff to be uninsurable, the plaintiff was, as provided in said application, reimbursed for its time and expenses in investigating said real estate title.

34 A true and correct copy of said application form for title insurance is attached hereto and made part hereof as Exhibit K.

The aforesaid policy of title insurance was embodied in a separate document, entitled "policy of title insurance," and a true and correct printed copy thereof is attached hereto and made a part hereof as Exhibit L.

9. The practice of the plaintiff in the guaranteeing of real estate mortgages during the years 1921 to 1925, both inclusive, as well as before and after that period, was as follows:

(1) An applicant for this service would apply to the plaintiff for a first mortgage loan upon the applicant's property upon which the proposed mortgage was to be placed, and for such inspections, examinations, appraisals, and other acts as were necessary and incidental thereto, the applicant agreeing to pay plaintiff's charges for such examinations, inspections, appraisals, and other acts as were necessary and incidental thereto. A true and correct copy of said application form is hereto attached and made part hereof as Exhibit M.

(2) The plaintiff would then examine the title to the property involved, appraise the value of such property and make all necessary inspections, examinations, etc.

(3) If all matters were satisfactory, the plaintiff would prepare a bond and mortgage, securing the payment of the bond, and cause the same to be executed by the applicant and recorded.

(4) The plaintiff would thereupon pay to the applicant the face value of the bond, less the charges for its services, retaining
35 the bond and mortgage as security for the repayment of such advancement, together with the interest thereon.

(5) Since its organization, including the years 1921 to 1925, inclusive, the plaintiff has received from investors and others, principally savings banks and insurance companies, requests to purchase from the plaintiff mortgage loans, or participations therein, the payment of which was to be guaranteed by the plaintiff.

(6) Pursuant to said requests, the plaintiff would then issue a so-called policy of mortgage guarantee, which guaranteed the payment at maturity of the principal of the bond and a stated rate of interest, which was less than the rate of interest stipulated in the bond, and guaranteed the mortgage to be a valid first lien upon a good and marketable title in fee to the real estate upon which the mortgage was placed.

(7) The bond and mortgage, together with the so-called policy of mortgage guarantee, or certificates of participation therein, would then be sold by the plaintiff for the face value thereof, with the agreement that the plaintiff should collect the interest and principal of the bond and mortgage and should retain as compensation all interest collected in excess of the rate guaranteed by the plaintiff. This excess of interest received over interest guaranteed generally amounted to one-half of one per cent of the face amount of the bond and constituted the consideration received by the plaintiff for its said guarantee of the payment at maturity of the principal of said bond and the stated rate of interest.

(8) The aforesaid so-called policy of mortgage guarantee
36 was embodied in a separate document, entitled "mortgage guarantee," a true and correct printed copy of which is attached hereto and made part hereof as Exhibit N, and in the community generally known as a "policy." The consideration for it was expressed in the policy and was known in the community as a "premium."

(9) The aforesaid certificates of participation were embodied in separate documents, entitled "guaranteed first mortgage certificate," a true and correct specimen copy of which is attached hereto and made a part hereof as Exhibit O.

(10) The plaintiff sold substantially all mortgages soon after it acquired them. The average period during which it held mortgages before selling them has not exceeded two months. It has at no time had or sold any mortgages except those which it acquired and guaranteed as aforesaid.

The primary purpose of the plaintiff in making loans on bonds and mortgages has at no time been and is not for investment, but for the sale of the bonds and mortgages, guaranteed as aforesaid, to investors either by way of complete assignments of the bonds and mortgages or by way of guaranteed mortgage certificates.

(11) The gross income of the plaintiff for the calendar years 1921 to 1925, inclusive, as shown by its reports to the insurance department of the State of New York for the respective years, other than from interest, rentals, profit on sale of assets, and dividends, has been reallocated by the plaintiff as follows:

37	1921	1922	1923	1924	1925
(1) Income consisting of the difference between the interest received and guaranteed by plaintiff in connection with its mortgage guarantees	$90,449.14	$105,750.03	$134,349.66	$175,641.39	$227,869.93
(2) Income from fees and charges attributable to mortgage guarantees, as hereinafter determined	88,679.75	139,830.45	115,658.86	133,549.10	149,830.35
(3) Income from fees and charges attributable to title insurance where plaintiff did not make the mortgage loans and did not guarantee the mortgages involved	270,030.79	406,019.93	565,155.86	576,771.36	714,949.06
(4) Income, arrived at as hereinafter indicated, consisting of the compensation and consideration received by the plaintiff for its agreement and undertaking, in its policies of mortgage guarantee, that the mortgage guaranteed is a valid first lien upon a good and marketable title in fee to the property covered by the mortgage, as shown in Exhibit N attached hereto	131,243.75	206,945.45	171,172.14	197,649.23	221,745.05
(5) Income from mortgage renewals	28,940.83	30,123.35	30,557.75	24,745.35	44,779.75
(6) Conveyancing fees collected	13,544.25	26,008.93	27,779.00	33,668.40	35,340.67
(7) Charges for searches collected	3,693.77	6,497.46	7,945.91	11,398.30	14,749.09
(8) Recording fees collected	3,316.28	4,994.43	6,723.69	6,133.14	9,252.70
(9) Charges for surveys collected	392.45	326.80	569.20	1,339.65	1,993.25
(10) Total gross income of the plaintiff, exclusive of interest, rents, profit on plaintiff's stock sold, gross profit on sale or maturity of real estate, mortgages, bonds and stocks, decrease in reserve for taxes, profit on second mortgages and cash addition to surplus, as shown in New York Insurance Reports, Part III	630,291.01	925,596.83	1,059,912.07	1,160,895.92	1,420,509.85
(11) Deduct sum of items (1), (3), (5), (6), (7), (8) and (9) above	410,367.58	578,820.93	773,081.07	829,697.59	1,048,934.45
(12) Balance	219,923.50	346,775.90	286,831.00	331,198.33	371,575.40
(13) Less item (4) above, determined by the plaintiff as hereinafter explained	131,243.75	206,945.45	171,172.14	197,649.23	221,745.05
(14) Balance, which constitutes item (2) above	88,679.75	139,830.45	115,658.86	133,549.10	149,830.35
(15) Item (4) above is arrived at by taking 0.59677 of item (12) above, and in amount is	131,243.75	206,945.45	171,172.14	197,649.23	221,745.05

38 The aforesaid 0.59677, shown in item (15) above, was calculated by the plaintiff upon the basis following:

As shown by Exhibits K and M attached hereto, all fees and charges which the plaintiff has at any time received from applicants for title insurance, specified in the application therefor (said Exhibit K), it has always, including the years 1921 to 1925, inclusive, received from all applicants for its mortgage guarantee service. The only additional fees and charges which the plaintiff has at any time received from applicants for its mortgage guarantee service, specified in the application therefor (said Exhibit M), consists of a fee for inspection and appraisal of the property. Said fees and charges which the plaintiff received during the years 1921 to 1925, inclusive, in connection with each policy of title insurance written by it, where the amount of the insurance was $5,000, amounted, in the aggregate, to approximately $74. Said fees and charges which the plaintiff received during the years 1921 to 1925, inclusive, in connection with each policy of mortgage guarantee written by it, where the amount of the loan was $5,000, consisted of said $74 and an additional charge of approximately $50 for inspection and appraisal of the property, or a total of $124. The ratio which said $74 is to said $124, to wit, 0.59677, is the factor used by the plaintiff in item (15) above.

Dwight Comstock is, and since before 1921 has been, vice-president and treasurer of the plaintiff. F. G. Nash is, and since before 1921 has been, assistant treasurer of the plaintiff. Each of said officers has and at all times during the years 1921 to 1925, inclusive, had

39 personal knowledge of the fees and charges received by the plaintiff from applicants for plaintiff's title insurance and applicants for its mortgage guarantee service, respectively, and based upon his said personal knowledge and experience, each of plaintiff's said officers has, in accordance with the aforesaid method by which the factor used in item (15) above was arrived at, bona fide estimated that of the income shown in item (12) above for each of the years 1921 to 1925, inclusive, not less than 0.59677 thereof consisted of the income described in item (4) above.

12. The plaintiff duly filed its income tax returns, including certain schedules attached thereto, for the calendar years 1921 to 1925, inclusive, with the collector of internal revenue for the first district of New York at Brooklyn, New York, true and correct copies of which are attached hereto and made a part hereof as Exhibits P, Q, R, S, and T, respectively.

13. The amount of title insurance written by the plaintiff, where the plaintiff did not make the mortgage loans and did not guarantee the mortgages involved, and the amount of mortgages guaranteed by the plaintiff for each of the calendar years 1921 to 1925, inclusive, were as follows:

Year	Title insurance written, where plaintiff did not make the mortgage loans and did not guarantee the mortgages involved	Mortgages guaranteed
1921	$29,090,650	$4,359,346
1922	46,050,180	7,319,246
1923	67,138,820	7,989,950
1924	69,442,530	11,341,239
1925	87,965,580	13,214,092

14. The aggregate amount of title insurance, where the plaintiff did not make the mortgage loans and did not guarantee the
40 mortgages involved, outstanding during each of the years 1921 to 1925, inclusive, was not less than $100,000,000.

15. On or about April 1, 1924, plaintiff filed a certain claim for abatement, a true and correct copy of which is attached hereto and made a part hereof as Exhibit U.

Under date of January 13, 1925, the Commissioner of Internal Revenue addressed a letter to the plaintiff, a true and correct copy of which is attached hereto and made a part hereof as Exhibit V.

Under date of January 27, 1925, the plaintiff addressed a letter to the Commissioner of Internal Revenue, a true and correct copy of which is attached hereto and made a part hereof as Exhibit W.

Under date of February 12, 1925, the Commissioner of Internal Revenue addressed a letter to the plaintiff, a true and correct copy of which is attached hereto and made a part hereof as Exhibit X.

Under date of March 4, 1925, the plaintiff addressed a letter to the Commissioner of Internal Revenue, a true and correct copy of which is attached hereto and made a part hereof as Exhibit Y.

On or about December 16, 1925, the Commissioner of Internal Revenue denied plaintiff's aforesaid claim in abatement by letter of that date, referred to in Exhibits B, G, and J, respectively, a true and correct copy of which letter is hereto attached and made a part hereof as Exhibit YY.

16. At none of the times material in this action were the plaintiff's assets segregated or earmarked in anyway for investment purposes or otherwise, all of its assets and all of its capi-
41 tal, surplus, and undivided profits being employed indiscriminately in its business activities; plaintiff has always maintained a guarantee fund pursuant to the provisions of Article V of the New York insurance law; all of the bonds and mortgages obtained by the plaintiff in the manner hereinbefore described were legal investments for such fund; plaintiff's investments of the classes required for said fund always exceeded the amount required by said statute; and no investments were segregated by the plaintiff as being

a part of a guarantee fund, the plaintiff always having on hand a sufficient amount of such investments to satisfy said requirements.

17. Plaintiff, during the periods here in question, made no segregation on its books of account of the expenses incurred by it as between that portion of its business above described as the insurance of titles and that portion of its business above described as the guaranteeing of mortgages.

18. A copy of plaintiff's by-laws in effect during the calendar years 1921, 1922, and 1923 is attached hereto and made part hereof as Exhibit Z.

19. Two corporations, to wit, Guaranteed Mortgage Company, 345 Madison Ave., New York City, and First Mortgage Guaranty Company, Long Island City, New York, each incorporated under the banking law of the State of New York and making its report to, and being under the supervision of, the superintendent of banks of said State of New York, were during the periods here in questions engaged in the business of making mortgage loans and selling mortgages, and participations therein, in part with and in part
42 without their guarantee. True and correct specimen copies of the instruments employed by each of these companies corresponding to Exhibit N "mortgage guarantee," and Exhibit O "guaranteed first mortgage certificate" employed by plaintiff, are attached hereto and made a part hereof as Exhibits 1, 2, 3, 4, and 5. The title to the property covered by the mortgages and participations therein, at any time made or sold by each of the said companies was and is, if insured, insured to said respective companies by other companies, to wit, title insurance companies. The title to the property covered by the mortgages, and participations therein, made or sold by the plaintiff at any time, including the years 1921 to 1925, was not and is not insured to the plaintiff or mortgagor by any other company or person.

20. The plaintiff is and always has been the sole owner of the aforesaid claims and has not transferred or assigned any of them or any part thereof or interest therein, and has at all times borne true allegiance to the Government of the United States and has in no way voluntarily aided, abetted or given encouragement to rebellion against said Government.

Dated, February 21, 1930.

WEILL, WOLFF & SATTERLEE,
Attorneys for Plaintiff.
HOWARD W. AMELI,
United States Attorney,
Attorney for the United States of America.
By ALBERT D. SMITH,
Asst. U. S. Atty.

43 In United States District Court, Eastern District of New York

L-3547. June 11, 1930.

HOME TITLE INSURANCE COMPANY, PLAINTIFF
against
UNITED STATES OF AMERICA, DEFENDANT

Weill, Wolff & Satterlee, Esqs., for the plaintiff (Hugh Satterlee and I. Herman Sher, Esqs., of counsel).

Howard W. Ameli, Esq., for the defendant (Albert D. Smith, Esq., assistant United States attorney; C. M. Charest, Esq., General Counsel Bureau of Internal Rvenue; E. H. Horton, Esq., attorney, Bureau of Internal Revenue, of counsel).

Opinion of the court

GALSTON, D. J.:

This case is presented upon an agreed state of facts.

There are three causes of action set forth in the complaint, each involving the same principle of law. The plaintiff seeks to recover from the defendant in each case a sum of money alleged erroneously to have been collected by the collector of internal revenue for
44 the first district of New York from the plaintiff under protest, and alleges exemptions of capital-stock tax liability under section 1000 of the 1921 act so far as the first and second causes of action are concerned, and under section 700 of the 1924 act as to the third cause of action.

The ground of recovery contended is that by virtue of section 246 of the revenue act of 1921 and sections 243 to 246 of the revenue act of 1924, the plaintiff as an insurance company was not subject to the imposition of any capital-stock tax.

Essentially and basically the question for determination is whether the plaintiff company is an insurance company within the meaning of the revenue acts in question. If the answer to that question is in the affirmative then the plaintiff is entitled to the relief which it seeks herein.

The term "insurance company" is not defined in either statute. Recourse, therefore, must be had to such provisions of the statute, if any, as may disclose the intention of Congress in that regard.

Section 1000 of the revenue act of 1921, provides:

"Sec. 1000. (a) (42 Stat. 295). That on and after July 1, 1922, in lieu of the tax imposed by section 1000 of the revenue act of 1918;

"(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess

of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included;

* * * * * * *

45 "Sec. 1000 (b) (42 Stat. 295). The taxes imposed by this section shall not apply * * * to any insurance company subject to the tax imposed by section 246."

It is to be noted that the capital-stock tax thus defined shall not apply "to any insurance company *subject to the tax imposed by section* * * * 246." (Italics mine.) Thus apparently not all so-called insurance companies but only such as are "subject to the tax imposed by section * * * 246" are to be relieved from the capital-stock tax.

Section 246 referred to reads as follows:

"Sec. 246. (42 Stat. 262) (a) That, in lieu of the taxes imposed by sections 230 and 1000, there shall be levied, collected and paid for the calendar year 1922, and for each taxable year thereafter, upon the net income of every insurance company (other than a life or mutual insurance company) a tax as follows:

"(1) In the case of such a domestic insurance company the same percentage of its net income as is imposed upon other corporations by section 230;

"(2) In the case of such a foreign insurance company the same percentage of its net income from sources within the United States as is imposed upon the net income of other corporations by section 230.

"(b) In the case of an insurance company subject to the tax imposed by this section:

"(1) The term 'gross income' means the combined gross amount, earned during the taxable year, from investment income and from underwriting income as provided in this subdivision, computed on the basis of the underwriting and investment exhibit of the
46 annual statement approved by the National Convention of Insurance Commissioners;

"(2) The term 'net income' means the gross income as defined in paragraph (1) of this subdivision less the deductions allowed by section 247;

"(3) The term 'invested income' means the gross amount of income earned during the taxable year from interest, dividends and rents, computed as follows:

"To all interest, dividends and rents received during the taxable year, add interest, dividends and rents due and accrued at the end of the taxable year, and deduct all interest, dividends and rents due and accrued at the end of the preceding taxable year;

"(4) The term 'underwriting income' means the premiums earned on insurance contracts during the taxable year less losses incurred and expenses incurred.

"(5) The term 'premiums earned on insurance contracts during the taxable year' means an amount computed as follows:

"From the amount of gross premiums written on insurance contracts during the taxable year, deduct return premiums and premiums paid for reinsurance. To the result so obtained add unearned premiums on outstanding business at the end of the preceding taxable year and deduct unearned premiums on outstanding business at the end of the taxable year;

"(6) The term 'losses incurred' means losses incurred during the taxable year on insurance contracts, computed as follows:

"To losses paid during the taxable year, add salvage and reinsurance recoverable outstanding at the end of the preceding taxable year, and deduct salvage and reinsurance recoverable outstanding at the end of the taxable year. To the result so obtained
47 add all unpaid losses outstanding at the end of the taxable year and deduct unpaid losses outstanding at the end of the preceding taxable year;

"(7) The term 'expenses incurred' means all expenses shown on the annual statement approved by the National Convention of Insurance Commissioners, and shall be computed as follows:

"To all expenses paid during the taxable year add expenses unpaid at the end of the taxable year and deduct expenses unpaid at the end of the preceding taxable year. For the purpose of computing the net income subject to the tax imposed by this section there shall be deducted from expenses incurred as defined in this paragraph all expenses incurred which are not allowed as deductions by section 247."

Sections 247 and 230 referred to therein are as follows:

"Sec. 247. (42 Stat. 263) (a) That in computing the net income of an insurance company subject to the tax imposed by section 246 there shall be allowed as deductions:

"(1) All ordinary and necessary expenses incurred, as provided in paragraph (1) of subdivision (a) of section 234;

"(2) All interest as provided in paragraph (2) of subdivision (a) of section 234;

"(3) Taxes as provided in paragraph (3) of subdivision (a) of section 234;

"(4) Losses incurred;

"(5) Bad debts in the nature of agency balances and bills receivable ascertained to be worthless and charged off within the taxable year;
48 "(6) The amount received as dividends from corporations as provided in paragraph (6) of subdivision (a) of section 234;

"(7) The amount of interest earned during the taxable year which under paragraph (4) of subdivision (b) of section 213 is exempt

from taxation under this title, and the amount of interest allowed as a credit under subdivision (a) of section 236;

"(8) A reasonable allowance, for the exhaustion, wear and tear of property, as provided in paragraph (7) of subdivision (a) of section 234;

"(9) In the case of such a domestic insurance company, the net income of which (computed without the benefit of this paragraph) is $25,000 or less, the sum of $2,000; but if the net income is more than $25,000 the tax imposed by section 246 shall not exceed the tax which would be payable if the $2,000 credit were allowed, plus the amount of the net income in excess of $25,000.

"(b) In the case of a foreign corporation the deductions allowed in this section shall be allowed to the extent provided in subdivision (b) of section 234.

"(c) Nothing in this section or in section 246 shall be construed to permit the same item to be twice deducted."

The provisions of the revenue act of 1924 are identical in principal though somewhat different in other respects.

It is thus seen that the issue is narrowed to the question as to whether the plaintiff is an "insurance company subject to the tax imposed by section * * * 246," or is it, for the purposes of the revenue acts, an ordinary corporation.

What is the nature of the plaintiff's business? It was
49 organized under article 5 of the insurance law of the State of New York (Laws of 1892, chapter 690) and filed its certificate of incorporation in the office of the superintendent of insurance of the State of New York on or about April 5th, 1906. It has since the date of its incorporation been subject to the examination and supervision of the superintendent of insurance of the State of New York and has filed annual reports with the superintendent of insurance of the State of New York. Its business has consisted in the insurance of titles to real estate and in the guaranteeing of real estate mortgages. In respect to its title insurance business, it may be said that plaintiff issued policies of title insurance after having examined and prepared abstracts of the titles in relation to real estate and chattels real. It is not with respect to that department of the plaintiff's business that controversy is raised, but rather as to the other functions exercised in the guaranteeing of real estate mortgages.

In conducting this mortgage guaranty business, plaintiff's practice requires an applicant for such guaranteed mortgage to apply for a first mortgage loan upon the applicant's property, and for such inspections, examinations, appraisal, and other acts as are necessary and incidental thereto. The applicant agrees to pay the plaintiff's charges for such services. Then follows in due course the preparation by the plaintiff of a bond and a mortgage to be executed by the applicant. The plaintiff pays the applicant the face value of the

bond less its charges for its services, retaining the bond and the mortgage as security for the repayment of the loan. The bond and the mortgage are then sold by the plaintiff for the face value thereof.

At the same time the plaintiff delivers to the purchaser a
50 policy of mortgage guaranty. The terms of the policy guarantee the payment of the principal of the bond at maturity, interest to be paid periodically, but at a rate lower than that stipulated in the bond, and guarantee the mortgage to be a valued first lien upon a good and marketable title in fee to the real estate in question. The plaintiff is required also to collect the interest and principal of the bond and the mortgage under the agreement, retaining as compensation for its guaranty all interest collected in excess of the rate guaranteed by the plaintiff. This excess of interest generally is one-half of one per cent of the face amount of the bond. It is the practice of the plaintiff soon after the acquisition of these mortgages to sell them at an average period of within two months from acquisition.

From the agreed state of facts it appears that a substantial part of the business carried on by the plaintiff consisted of the sale of guaranteed mortgages. It is the contention of the defendant that in such circumstances, since the guaranteeing of real estate mortgages is not insurance, a corporation engaged in such business is not entitled to be classed as an insurance company for purposes of Federal taxation under the provisions of sections 246 and 247 of the revenue acts of 1921 and 1924.

What did Congress intend? By section 230 of the revenue act of 1921 (42 Stat. 252), Congress imposed an income tax upon the net income of every corporation based upon its gross income "from whatever source derived" (sec. 213–A; 42 Stat. 238). Sections 246 and 247 make those latter sections inapplicable to insurance companies. The exception, therefore, must be strictly construed. United States v. Dixon, 15 Pet. 141; Bank of Commerce v. Tennessee, 161 U. S. 134.

51 The defendant argues in brief that the income of an ordinary insurance company derived from its business of making and selling insurance contracts, consists of its premium income (resulting from the issuance of its policies), and secondly, its investment income (derived from investment of its capital, surplus and undivided profits). These two classes of income are indeed the "gross income" of an insurance company as defined in section 246.

If, now the provisions of section 247 are analyzed, it is found that in computing the "net income of an insurance company subject to the tax imposed by section 246," only such deductions are permitted as represent losses and expenses incurred in the production of the gross income defined in section 246. It would seem, therefore, that Congress did not intend by sections 246 and 247 to exempt from taxation any income not classified as the income of an insurance

company under said section 246. The inference drawn by the Government then is that since a substantial part of the income of the plaintiff is neither premium income nor investment income, it is not that kind of income which Congress has made characteristic or typical or indeed the income of an insurance company. The Government's syllogism might be stated thus:

"All insurance companies (under the revenue acts) are those, the sole income of which consists of premium income and investment income.

"Plaintiff company is not one, the sole income of which consists of premium and investment income.

"Therefore, the plaintiff is not an insurance company such as Congress intended to relieve from the payment of the capital stock tax."

52 Reasonableness is given to this conclusion, the defendant argues, because Congress did not intend that any income not classified as the income of an insurance company (i. e., premium income and investment income) should be exempt from taxation.

A similar situation as that involved herein is reported in Louisville Title Company v. Lucas, 27 Fed. (2d) 413. In that case the plaintiff was engaged in the dual business of insuring titles to real estate and of selling and guaranteeing mortgages. It was said:

"Congress was undoubtedly undertaking, in section 246, to provide for the taxation of all of the income of insurance companies subject to its provisions. In so doing it provided for the taxation of only that income ordinarily understood to be enjoyed by insurance companies, viz., premium income and incidental income, flowing from the investment of its capital and surplus. If it had been the intention of Congress to give these companies which were conducting not only an insurance business, but also some separate and distinct business, the benefit of section 246, undoubtedly provision would have been made for reporting and taxing the income derived from such separate and distinct business. To assume otherwise would be to impute to Congress a deliberate intention to exempt the income of some businesses from taxation altogether, simply because they were conducted by a corporation also engaged in the insurance business.

"I think, therefore, we must conclude that if an insurance company, in addition to its insurance business, conducts a separate and distinct business, from which it obtains a substantial income, it is not subject to taxation under section 246, nor exempt from taxation under section 1000."

53 The court then stated that the mortgage sale department or business of the Louisville Title Company was wholly distinct from its title insurance business, and added:

"Of course, a guaranty of the payment of the obligation of another, according to the terms thereof, is not an insurance contract

any more than is the endorsement of a negotiable instrument an insurance contract."

A "guaranty" is defined to be a promise to answer for the payment of some debt or the performance of some duty in case of the failure of another person, who in the first instance was liable for such payment or performance (4 Words and Phrases 3179, and cases therein cited).

In this respect it differs from insurance, which is a contract involving a direct, not an indirect, obligation. A contract of insurance is a personal contract of indemnity between the insured and the underwriter. The contract of insurance does not attach itself to the thing insured, nor go with it when it is transferred. Northern Trust Co. v. Snyder, 76 Fed. 34.

Plaintiff's contract of guaranty certainly falls within the former class and not the latter. It obligates the plaintiff to pay the full amount of the principal and interest upon default of the mortgagor and not merely to indemnify the holder of the mortgage to the extent of a loss that might be sustained by him. It follows that such of plaintiff's income as is derived from its business of guaranteeing real estate mortgages should not be exempt from taxation, and yet it would be if plaintiff were held to be an insurance company within the intent and meaning of the revenue acts in question, for such income is neither investment income nor underwriting income as defined in section 246.

54 It may be said in conclusion that the mere fact that the plaintiff has a charter from the State of New York, which permits it to do an insurance business, does not make it an insurance company within the meaning of section 246. Louisville Title Company v. Lucas, 27 Fed. (2d) 413.

The findings of fact will be the stipulated facts.

The motion for judgment on behalf of the defendant is granted.

CLARENCE G. GALSTON,
U. S. D. J.

In United States District Court

[Title omitted.]

Plaintiff's request for findings

February 24, 1930

The plaintiff respectfully requests that the court adopt the agreed statement of facts herein as its findings of fact and make the following conclusions of law:

1. During the taxable years ended June 30, 1923 and 1924, the plaintiff was, within the meaning of section 1000 of the revenue act of 1921, an insurance company subject to the tax imposed by section 243 or 246 of the revenue act of 1921.

55 2. During the taxable year beginning July 1, 1924, and ending June 30, 1925, the plaintiff was, within the meaning of section 700 of the revenue act of 1924, an insurance company subject to the tax imposed by section 243 or 246 of the revenue act of 1924.

3. During the taxable years ended June 30, 1923, and 1924, the plaintiff was not subject to the capital stock tax imposed by section 1000 of the revenue act of 1921.

4. During the taxable year beginning July 1, 1924, and ending June 30, 1925, the plaintiff was not subject to the capital stock tax imposed by section 700 of the revenue act of 1924.

5. The capital stock tax in the sum of $1,392 for the taxable year ended June 30, 1923, was erroneously and illegally assessed and collected, and the plaintiff is entitled to recover said sum from the defendant, with interest from February 4, 1926.

6. The capital stock tax in the sum of $1,850 for the taxable year ended June 30, 1924, was erroneously and illegally assessed and collected, and the plaintiff is entitled to recover said sum from the defendant, with interest from February 4, 1926.

7. The capital stock tax in the sum of $2,144 for the taxable year ended June 30, 1925, was erroneously and illegally assessed and collected, and the plaintiff is entitled to recover said sum from the defendant, with interest from February 4, 1926.

Respectfully submitted.

WEILL, WOLFF & SATTERLEE,
Attorneys for the Plaintiff.

56 In United States District Court

[Title omitted.]

Amended request for findings of fact

Filed April 8, 1930

The plaintiff, considering the facts hereinafter set forth to be proven and deeming them material to the due presentation of this case in the findings of fact, requests the court to find them as follows (the references to articles are to articles of the agreed statement of facts; and the references to exhibits are to exhibits attached to the agreed statement of facts and incorporated therein by reference):

1. This is a suit of a civil nature at common law and the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000, and is less than the sum of $10,000, and this suit and the causes of action set forth in the complaint herein arise under the Constitution of the United States of America and the laws thereof providing for internal revenue. (Article 1.)

57 2. Plaintiff is and at all times herein mentioned was a domestic corporation duly organized and existing under the

laws of the State of New York pertaining to title and credit guarantee corporations, namely Article V of the insurance law of said State of New York (Laws of 1892, chapter 690), its charter or certificate of incorporation having been duly filed in the office of the superintendent of insurance of the State of New York on or about April 5, 1906.

The certificate of incorporation of the plaintiff states in part as follows:

"First: That the name of the proposed corporation is 'Home Title Insurance Company of New York.'

"Second: It is to be a title guaranty corporation and the purposes for which it is to be formed are as provided in and by section one hundred and seventy, subdivision one, of the insurance law of New York State."

On or about April 15, 1921, the plaintiff's name was duly changed to Home Title Insurance Company.

(Article 2; Exhibit A.)

3. On or about December 13, 1923, plaintiff filed a capital stock tax return for the period beginning July 1, 1922, and ending June 30, 1923, and the Commissioner of Internal Revenue thereafter audited said return and determined and found the sum of $1.392 as a capital stock tax liability of the plaintiff for said period, which sum he thereafter assessed.

On February 4, 1926, the plaintiff was compelled to pay and did pay, under protest and duress, to the collector of internal rev-
58 enue for the first district of New York at Brooklyn, New York, said sum of $1,392, which amount the United States has received from said collector in the usual course of his official business and still retains.

Thereafter, plaintiff, on or about February 10, 1926, duly filed its claim for refund of the $1,392 paid by the plaintiff as aforesaid, for the reasons stated in said claim as follows:

"That the above company being an insurance company is not liable for a capital stock tax."

On or about April 22, 1926, the Commissioner of Internal Revenue of the United States rejected said refund claim.

(Article 3; Exhibit D.)

4. On or about December 6, 1923, plaintiff filed a capital stock tax return for the period beginning July 1, 1923, and ending June 30, 1924. Thereafter the Commissioner of Internal Revenue determined and assessed the sum of $1,850 as a capital stock tax liability of the plaintiff for said period.

On February 4, 1926, the plaintiff was compelled to pay and did pay, under protest and duress, to the collector of internal revenue for the first district of New York at Brooklyn, New York, said sum of $1,850, which amount the United States has received from said collector in the usual course of his official business and still retains.

On February 10, 1926, the plaintiff duly filed its claim for refund of the $1,850 paid by the plaintiff as aforesaid, for the reasons stated in said claim as follows:

59 "That the above company being an insurance company is not liable for a capital-stock tax."

On or about April 22, 1926, the Commissioner of Internal Revenue of the United States rejected said refund claim.

(Article 4; Exhibit F.)

5. On or about September 18, 1924, plaintiff filed a capital-stock tax return for the period beginning July 1, 1924, and ending June 30, 1925. Thereafter, the Commissioner of Internal Revenue determined and assessed the sum of $2,144 as a capital-stock tax liability of the plaintiff for said period.

On February 4, 1926, the plaintiff was compelled to pay and did pay, under protest and duress, to the collector of internal revenue for the first district of New York at Brooklyn, New York, said sum of $2,144, which amount the United States has received from said collector in the usual course of his official business and still retains.

On February 10, 1926, the plaintiff duly filed its claim for refund of the $2,144 paid by the plaintiff as aforesaid, for the reason stated in said claim as follows:

"That the above company being an insurance company is not liable for a capital-stock tax."

On or about April 22, 1926, the Commissioner of Internal Revenue of the United States rejected said refund claim.

(Article 5; Exhibit I.)

6. Plaintiff, since the date of its incorporation, has always

60 been, and now is, subject to examination by, and supervision of, the superintendent of insurance of the State of New York, and is, and has always been, subject to all the provisions of the insurance law of the State of New York applicable to so-called title and credit guarantee corporations organized thereunder, and is, and has always been, required to file, and has filed annually with the said superintendent of insurance, on forms approved by him, the statements required by law for each year and as of December 31st of each year.

During the years 1921 to 1925, inclusive, as well as before and after that period, the plaintiff always complied with the insurance law of the State of New York and the regulations of the insurance department of said State.

In its said annual reports to the superintendent of insurance of the State of New York the plaintiff reported its income, outgo, assets, liabilities, capital, surplus, guaranteed bonds and mortgages, guarantee fund and stock for each of the calendar years 1921 to 1925, inclusive, as follows:

	1921		1922		1923		1924		1925	
INCOME										
Premiums for title insurance	$29,090.65		$46,050.18		$67,138.82		$69,442.53		$87,965.58	
Premiums for mortgage guarnatees	90,449.14		105,750.03		134,349.66		175,641.39		227,869.93	
		$119,539.79		$151,800.21		$201,488.48		$245,083.92		$315,835.51
Fees for:										
Searches	3,693.77		6,497.46		7,945.91		11,398.30		14,749.09	
Conveyances	13,544.25		26,008.93		27,779.00		33,668.40		35,340.67	
Examinations	479,420.46		733,752.80		813,048.88		861,675.77		1,042,461.83	
Sundry	4,153.09		5,234.03		7,349.20		8,309.90		11,151.30	
Old accounts collected	9,939.65		2,303.40		2,300.60		759.63		971.45	
		510,751.22		773,796.62		858,423.59		915,812.00		1,104,674.34
Interest earned on:										
Mortgage loans	51,840.98		83,942.74		111,040.94		131,930.59		153,313.76	
Bonds and stocks	14,216.05		6,780.08		215.21		7,800.00		15,632.07	
Bank deposits	4,341.45		5,464.26		7,754.72		8,540.57		10,087.27	
Real estate investment	102.39		3,617.08		5,021.57		4,740.00		4,216.07	
Sundry	1,570.00		2,536.50		3,035.50		3,162.69		5,814.73	
		72,070.87		102,330.66		127,067.94		156,173.85		189,063.90
Rents		−2,505.65		863.91		20,997.41		35,000.03		12,108.23
Profit on company's stock sold		850.00								
Gross profit on sale or maturity of:										
Real estate	3,342.47				11.45		7,089.20		38,500.00	
Mortgages							218.63		422.00	
Bonds	1,410.11		19.37							
Stocks			10.00		300.00					
		4,752.58		29.37		311.45		7,307.83		38,922.00
Decrease in reserve for taxes						8,205.95		10,395.10		
Profit on second mortgages						138.30				
Cash addition to surplus								1,050.00		450.00
Total income		705,458.81		1,028,820.77		1,216,633.12		1,370,822.73		1,661,054.28
Surplus December 31 of preceding year		685,206.67		791,593.12		1,013,519.77		1,074,051.55		1,181,037.08
Total		1,390,665.48		1,820,413.89		2,230,152.89		2,444,874.28		2,842,091.36

Income statement—Continued

52 OUTGO	1921		1922		1923		1924		1925	
Losses incurred		$861.71		$2,841.87		$7,599.50		$158,535.88		$89,966.79
Commissions or brokerage		41,078.21		59,751.30		82,641.80		82,827.94		95,816.79
Salaries, fees and other charges of officers, directors, trustees and office employees		281,963.78		374,142.80		515,479.01		587,004.59		718,124.33
Rents		15,836.02		21,283.77		24,081.21		30,507.79		39,422.03
Advertising	$29,608.43		$41,357.33		$49,394.72		$41,655.55		$28,501.50	
Printing and stationery	9,610.91		12,413.80		10,914.28		11,281.82		15,087.44	
Furniture and fixtures	19,412.00		12,737.41		2,184.74		1,805.53		3,529.94	
Postage, telegrams, telephone and express	6,044.06		7,717.72		9,168.90		11,262.77		13,294.13	
Miscellaneous office expenses	30,870.77		42,466.19		41,480.54		48,368.81		47,589.79	
		95,546.17		116,692.48		113,143.18		114,374.48		108,002.80
Legal expenses		2,724.11		10,331.53		14,188.21		3,383.54		1,566.52
Insurance department licenses and fees				54.03						125.00
All other licenses, fees and taxes:										
Federal corporations or income tax	27,242.06		48,274.37		52,627.75		46,746.32		69,349.92	
State tax on premiums	1,081.44		1,195.40		460.50		2,014.88		2,550.84	
Sundry	5,182.98		1,139.76		485.44		521.10		40.83	
		33,506.48		50,609.53		53,573.69		49,282.30		71,841.59
Interest charges incurred:										
Borrowed money	18,129.31		22,111.56			28,235.89		28,805.88		29,621.31
Mortgages	2,004.25		991.75							
		20,133.56		23,103.31						
Accounts charged off		6,090.21		4,654.59		4,982.54		8,171.96		6,438.40
Dividends to stockholders		76,500.00		97,500.00		120,000.00		142,500.00		150,000.00
Book values written off:										
Real estate		4,832.11		3,507.11		13,164.89		4,800.00		4,794.61
Reserve for taxes		20,000.00		5,000.00						
Reserve for losses				37,421.80						
Increase in contingent reserve						152,578.20				
Increase in loss reserve								10,000.00		45,574.00
Real estate expense						26,058.22		42,992.84		
Gross loss on sale or maturity of bonds						375.00				
Commission on sale of real estate								650.00		
Total outgo		599,072.36		806,894.12		1,156,101.34		1,263,837.20		1,361,294.17
Surplus end of year		791,593.12		1,013,519.77		1,074,051.55		1,181,037.08		1,480,797.19
Total		1,390,665.48		1,820,413.89		2,230,152.89		2,444,874.28		2,843,091.36

	1921		1922		1923		1924		1925	
ASSETS										
Market value of real estate		$255,098.50		$238,879.94		$305,512.30		$310,794.61		$523,461.75
Mortgage loans		1,054,978.33		1,979,581.70		2,245,167.26		2,035,801.94		2,913,507.27
Market value of stocks		435,450.00		288,750.00		370,860.00		370,860.00		385,860.00
Cash in office		1,140.83		2,370.43		20,522.32		2,717.16		13,208.47
Deposits in banks		113,902.64		158,864.16		278,887.89		348,531.85		382,724.01
Fees receivable:										
Search	$1,473.88		$2,287.89		$2,904.80		$3,045.75		$4,616.91	
Conveyances	115.00		215.00		245.00		690.00		285.00	
Examinations	19,390.31		32,375.46		42,972.53		41,225.25		63,225.97	
Sundry	2,519.14		2,773.71		2,231.89		1,266.44		2,168.00	
		23,498.33		37,652.06		48,354.22		46,227.44		70,295.88
Interest due and accrued:										
Mortgage loans	12,028.26			17,314.63		33,424.23	41,029.56			43,667.22
Bank deposits	636.13						525.00			
		12,664.39						41,554.56		
Guaranteed interest due		5,365.37		10,366.93						
Accrued guaranteed interest receivable		330,749.66		432,884.81		548,637.62		669,675.20		813,010.13
Interest due and accrued on mortgages sold		8,319.99		13,014.49						
Documentary revenue stamps		400.00		400.00		2,000.00		2,000.00		2,100.00
Interest prepaid on loans		1,696.83		3,194.43		4,877.84		522.23		3,796.13
Accounts receivable								9,360.41		30,516.35
Total assets		2,243,263.87		3,183,273.58		3,858,243.68		3,838,045.40		5,182,144.21

Balance sheets—December 31—Continued

	1921	1922	1923	1924	1925
64 LIABILITIES, CAPITAL, AND SURPLUS					
Borrowed money	$150,000.00	$400,000.00	$800,000.00	$200,000.00	$775,000.00
Incumbrances on company's real estate	32,500.00				46,500.00
Interest due and accrued	1,070.06	400.25			2,607.05
Estimated amount of taxes hereafter payable based on business of year of this statement	50,000.00	55,000.00	46,794.05	36,398.95	66,742.12
Premiums, fees, or other items received in advance	28,867.83	33,102.27	54,835.09	62,370.15	66,297.36
Clients' money retained	71,800.54	129,442.57	129,695.22	178,769.66	212,458.63
Accrued guaranteed interest payable	313,832.32	401,536.92	485,781.74	590,519.39	718,872.08
Mortgages sold, not delivered	53,600.00	112,850.00	75,258.50	91,004.49	108,592.30
Interest on above accrued			599.91	483.01	1,469.15
Reserve for losses unadjusted		37,421.80	190,000.00	200,000.00	245,574.00
Salaries, expenses, bills, etc., due or accrued			1,227.62	3,525.38	5,529.33
Special trust account				43,837.29	
Subscriptions to new stock					201,710.00
Total liabilities	701,670.75	1,169,753.81	1,784,192.13	1,407,008.32	2,451,347.02
Capital	750,000.00	1,000,000.00	1,000,000.00	1,250,000.00	1,250,000.00
Surplus Dec. 31	791,593.12	1,013,519.77	1,074,051.55	1,181,037.08	1,480,797.19
Total liabilities, capital and surplus	2,243,263.87	3,183,273.58	3,858,243.68	3,838,045.40	5,182,144.21
GENERAL INTERROGATORIES					
Aggregate amount of bonds and mortgages outstanding Dec. 31, payment of principal and interest of which has been guaranteed by this corporation	20,636,027.00	25,933,875.00	32,290,140.00	40,305,474.00	48,500,968.00
Sum set apart by company pursuant to requirements of sec. 176 of insurance law as a guarantee fund	547,100.00	744,000.00	678,000.00	910,000.00	925,000.00

	Par value	Book and market value	Par value	Book and market value	Per value	Book and market value	Par value	Book and market value	Par value	Book and market value
STOCKS OWNED										
Banks, trust and insurance companies (United States)	$194,300.00	$291,450.00	$191,700.00	$288,750.00	$270,000.00	$370,860.00	$270,000.00	$370,860.00	$275,000.00	$383,360.00
Industrial and miscellaneous (United States)	96,000.00	144,000.00							2,500.00	2,500.00
Total	290,300.00	435,450.00	191,700.00	288,750.00	270,000.00	370,860.00	270,000.00	370,860.00	277,500.00	385,860.00

65 (Article 6; Part III of New York Insurance Reports for the years 1922 to 1926, inclusive.)

7. Since its organization, including the years 1921 to 1925, inclusive, the plaintiff's business has consisted of the insurance of titles to real estate and the guaranteeing of real estate mortgages, and said business is and has at all times been carried on by the plaintiff as stated herein.

The plaintiff has at all times refused to guarantee any mortgage with respect to which it did not have full knowledge and over which it did not have complete control.

(Article 7.)

8. The practice of the plaintiff in the insurance of titles to real estate during the years 1921 to 1925, both inclusive, as well as before and after that period, was as follows:

(1) The plaintiff issued policies of title insurance for which it received fixed charges, collected by plaintiff for each policy when issued, based on a scale dependent upon the amount of the policy. In this connection, solely as preliminary steps thereto, the plaintiff examined and prepared abstracts of titles, made searches and procured information, in relation thereto, to real estate and chattels real.

(2) A person, desiring a policy of title insurance, made written application to the plaintiff for such policy. The plaintiff thereafter made an investigation and search of the records pertaining to the title of the real estate and chattels real in question, and if the title was found to be insurable by the plaintiff its policy of title insurance was issued as provided in said application. If such title
66 was found by the plaintiff to be uninsurable, the plaintiff was, as provided in said application, reimbursed for its time and expenses in investigating said real estate title.

(3) The aforesaid policy of title insurance was embodied in a separate document, entitled "policy of title insurance," and therein the plaintiff insured against all loss or damage sustained by reason of any defect or defects of the title affecting the premises covered by the policy, or affecting the interests of the insured therein, or by reason of unmarketability of the title of the insured to or in said premises, or by reason of liens or incumbrances charging the same at the date of the policy.

(Article 8; Exhibits K and L.)

9. The practice of the plaintiff in the guaranteeing of real estate mortgages during the years 1921 to 1925, both inclusive, as well as before and after that period, was as follows:

(1) An applicant for this service would apply to the plaintiff for a first mortgage loan upon the applicant's property upon which the proposed mortgage was to be placed; for the insurance of the title to such property; for the examination of the title; and for such other inspections, examinations, appraisals and other acts as were necessary and incidental thereto, the applicant agreeing to pay

plaintiff's charges for such title insurance, examinations, inspections, appraisals and other acts necessary and incidental thereto.

(2) The plaintiff would then examine the title to the property involved, appraised the value of such property and make all necessary inspections, examinations, etc.

67 (3) If all matters were satisfactory, the plaintiff would prepare a bond and mortgage, securing the payment of the bond, and cause the same to be executed by the applicant and recorded.

(4) The plaintiff would thereupon pay to the applicant the face value of the bond, less the charges for its services, retaining the bond and mortgage as security for the repayment of such advancement, together with the interest thereon.

(5) Since its organization, including the years 1921 to 1925, inclusive, the plaintiff has received from investors and others, principally savings banks and insurance companies, requests to purchase from the plaintiff mortgage loans, or participations therein, the payment of which was to be guaranteed by the plaintiff.

(6) Pursuant to said requests, the plaintiff would then issue a policy of mortgage guarantee, which guaranteed the payment at maturity of the principal of the bond and a stated rate of interest which was less than the rate of interest stipulated in the bond, and guaranteed the mortgage to be a valid first lien upon a good and marketable title in fee to the real estate upon which the mortgage was placed.

(7) The bond and mortgage, together with the policy of mortgage guarantee, or certificates of participation therein, would then be sold by the plaintiff for the face value thereof, with the agreement that the plaintiff should collect the interest and principal of the bond and mortgage and should retain as compensation all interest collected in excess of the rate guaranteed by the plaintiff. This excess of interest received over interest guaranteed generally amounted to one-half of one per cent of the face amount of

68 the bond and constituted the consideration received by the plaintiff for its said guarantee of the payment at maturity of the principal of said bond and the stated rate of interest.

(8) The aforesaid policy of mortgage guarantee was embodied in a separate document, entitled "mortgage guarantee," and in the community generally was known as a "policy." The consideration for it was expressed in the policy and was known in the community as a "premium."

(9) The aforesaid certificates of participation were embodied in separate documents, entitled "guaranteed first mortgage certificate."

(Article 9; Exhibits M, N, and O.)

10. The plaintiff sold substantially all mortgages soon after it acquired them. The average period during which it held said mortgages before selling them has not exceeded two months. It has at no time had or sold any mortgages except those which it acquired and guaranteed as aforesaid.

The primary purpose of the plaintiff in making loans on bonds and mortgages has at no time been and is not for investment, but for the sale of the bonds and mortgages, guaranteed as aforesaid, to investors either by way of complete assignments of the bonds and mortgages or by way of guaranteed mortgage certificates.

(Article 10.)

11. All fees and charges which the plaintiff has at any time received from applicants for title insurance, specified in the application therefor and consisting of fees and charges for examination of the title, conveyancing, survey, tax search, and disbursements for recording fees, recording tax and Federal tax, it has always, including the years 1921 to 1925, inclusive, received from all applicants for its mortgage guarantee service. The only additional fees and charges which the plaintiff has at any time received from applicants for its mortgage guarantee service, specified in the application therefor, consists of a *fee for inspection* and appraisal of the property.

12. The gross income of the plaintiff for the calendar years 1921 to 1925, inclusive, reported by it to the insurance department of the State of New York for said respective years, properly allocated to the various services performed and business done by the plaintiff during said years, consists of the following:

	1921	1922	1923	1924	1925
INCOME FROM FEES AND CHARGES					
(1) Income consisting of the difference between the interest received and guaranteed by plaintiff in connection with its mortgage guarantees	$90,449.14	$105,750.03	$134,349.66	$175,641.39	$227,869.93
(2) Income from fees and charges attributable to mortgage guarantees	88,679.75	139,830.45	115,658.86	133,549.10	149,830.35
(3) Income from fees and charges attributable to title insurance where plaintiff did not make the mortgage loans and did not guarantee the mortgages involved	270,030.79	406,019.93	565,155.86	576,771.36	714,949.06
(4) Income consisting of the compensation and consideration received by the plaintiff for its agreement and undertaking, in its policies of mortgage guarantee, that the mortgage guaranteed is a valid first lien upon a good and marketable title in fee to the property covered by the mortgage	131,243.75	206,945.45	171,172.14	197,649.23	221,745.05
(5) Income from mortgage renewals	28,940.83	30,123.35	30,557.75	24,745.35	44,779.75
(6) Conveyancing fees collected	13,544.25	26,008.93	27,779.00	33,668.40	35,340.67
(7) Charges for searches collected	3,693.77	6,497.46	7,945.91	11,398.30	14,749.09
(8) Recording fees collected	3,316.28	4,094.43	6,723.69	6,[illegible]33.14	9,252.70
(9) Charges for surveys collected	392.45	326.80	569.20	1,339.65	1,993.25
Total	630,291.01	925,596.83	1,059,912.07	1,160,895.92	1,420,509.85
Other income, as shown in paragraph 6 above	75,167.80	103,223.94	156,721.05	209,926.81	240,544.43
Total income	705,458.81	1,028,820.77	1,216,633.12	1,370,822.73	1,661,054.28

(Article 11.)

13. The amount of title insurance written by the plaintiff, where the plaintiff did not make the mortgage loans and did not guarantee the mortgages involved, and the amount of mortgages guar-

anteed by the plaintiff for each of the calendar years 1921 to 1925, inclusive, were as follows:

Year	Title insurance written, where plaintiff did not make the mortgage loans and did not guarantee the mortgages involved	Mortgages guaranteed
1921	$29,090,650	$4,389,346
1922	46,050,180	7,319,246
1923	67,138,820	7,988,960
1924	69,442,530	11,341,220
1925	87,965,580	13,214,092

(Article 13.)

14. The aggregate amount of title insurance, where the plaintiff did not make the mortgage loans and did not guarantee the mortgages involved, outstanding during each of the years 1921 to 1925, inclusive, was not less than $100,000,000. (Article 14.)

15. The plaintiff has always maintained a guarantee fund pursuant to the provisions of Article V of the New York insurance law. All of the bonds and mortgages obtained by the plaintiff in the manner hereinbefore described were legal investments for such fund. The plaintiff's investments of the classes required for such fund always exceeded the amount required by said statute. No investments were, therefore, segregated by the plaintiff as being a part of a guarantee fund, the plaintiff always having on hand a sufficient amount of such investments to satisfy said requirements. (Article 16.)

72 16. The plaintiff is and always has been the sole owner of the aforesaid claims and has not transferred or assigned any of them or any part thereof or interest therein, and has at all times borne true allegiance to the Government of the United States and has in no way voluntarily aided, abetted, or given encouragement to rebellion against said Government. (Article 20.)

In United States District Court

[Title omitted.]

Defendant's request for findings of fact and conclusion of law

Defendant, considering the facts set forth in the agreed statement of facts, Nos. 1 to 20, inclusive, to be proved, and deeming them material to the due presentation of this case in the findings of fact, requests the court to adopt said agreed statement of facts as its findings of fact in this case.

73 CONCLUSION OF LAW

On the foregoing findings of fact, plaintiff is not entitled to recover, and its petition must be dismissed.

Respectfully submitted.

HOWARD W. AMELI,
United States Attorney.
ALBERT D. SMITH,
Ass't. United States Attorney.

In United States District Court

[Title omitted.]

Motion for judgment on behalf of defendant

Now comes the defendant in the above-entitled cause and moves the court for judgment on the following grounds, to wit:

1. That the plaintiff has in this case adduced no substantial and/or sufficient evidence which warrants a judgment in its favor and against this defendant.

74 2. That plaintiff during the calendar years 1921 to 1925, inclusive, because engaged in the business of guaranteeing real-estate mortgages and participations therein, was not during the periods here in question entitled to be classed as an insurance company under the provisions, and within the meaning, of sections 246, 247, and 1000 of the revenue act of 1921.

3. That plaintiff during the calendar years 1921 to 1925, inclusive, because engaged in the business of guaranteeing real-estate mortgages and participations therein, was not during the periods here in question entitled to exemption from the payment of the capital stock taxes imposed by section 1000 of the revenue act of 1921.

4. That a substantial portion of plaintiff's income derived in the general conduct of its business during the years 1921 to 1925, inclusive, was not, within the intent and meaning of sections 246 and 247 of the revenue act of 1921, the income of an insurance company as therein defined, and by reason thereof plaintiff was not during the periods here in question entitled to be classed as an insurance company within the intent and meaning of Congress for the purposes of Federal taxation under the said revenue act of 1921.

5. That plaintiff's so-called policy of mortgage guarantee, entitled "mortgage guarantee" (Exhibit N), and so-called certificate of participation, entitled "guaranteed first-mortgage certificate" (Exhibit O), were not, nor was either of them, contracts of insurance, but the same constituted contracts of guarantee.

6. That the taxes sought to be recovered herein were legally assessed and lawfully collected by this defendant.

75 7. That on the facts and on the law defendant is entitled to judgment dismissing plaintiff's petition at its costs.

Respectfully submitted.

HOWARD W. AMELI,
United States Attorney,
ALBERT D. SMITH,
Asst. United States Attorney,
Attorneys for Defendant.

[Title omitted.]

Motion for judgment on behalf of defendant

In United States District Court

Now comes the defendant in the above-entitled cause and moves the court for judgment on the following grounds, to wit:

1. That the plaintiff has in this case adduced no substantial and/or sufficient evidence which warrants a judgment in its favor and against this defendant.

76 2. That plaintiff during the calendar years 1921 to 1925, inclusive, because engaged in the business of guaranteeing real-estate mortgages and participations therein, was not during the periods herein question entitled to be classed as an insurance company under the provisions and within the meaning of sections 246, 247, and 1000 of the revenue act of 1921, and sections 246, 247, and 700 of the revenue act of 1924.

3. That plaintiff, during the calendar years 1921 to 1925, inclusive, because engaged in the business of guaranteeing real-estate mortgages and participations therein, was not during the periods here in question entitled to exemption from the payment of the capital-stock taxes imposed by section 1000 of the revenue act of 1921, and section 700 of the revenue act of 1924.

4. That a substantial portion of plaintiff's income derived in the general conduct of its business during the years 1921 to 1925, inclusive, was not, within the intent and meaning of sections 246 and 247 of the revenue acts of 1921 an 1924, the income of an insurance company as therein defined, and by reason thereof plaintiff was not during the periods here in question entitled to be classed as an insurance company within the intent and meaning of Congress for the purposes of Federal taxation under the said revenue acts of 1921 and 1924.

5. The plaintiff's so-called policy of mortgage guarantee, entitled "mortgage guarantee" (Exhibit N), and so-called certificate of participation, entitled "guarantee first-mortgage certificate" (Exhibit O), were not, nor was either of them, contracts of insurance, but the same constituted contracts of guarantee.

77 6. That the taxes sought to be recovered herein were legally assessed and lawfully collected by this defendant.

7. That on the facts and on the law defendant is entitled to judgment dismissing plaintiff's petition at its costs.

Respectfully submitted.

HOWARD W. AMELI,
United States Attorney,
ALBERT D. SMITH,
Asst. United States Attorney,
Attorneys for Defendant.

In United States District Court

[Title omitted.]

Notice of exceptions

SIRS:

Please take notice that Home Title Insurance Company, the plaintiff herein, excepts to the decision and findings of the court filed in the above-entitled action on the 11th day of June, 1930, and to
78 the refusal of the court to find facts and conclusions of law as requested by the plaintiff in the following particulars:

(1) The plaintiff excepts and objects to the court's refusal and failure, upon its decision of this case, to separately state its findings of fact and conclusions of law, as requested by the parties herein in their agreed statement of facts.

(2) The plaintiff excepts and objects to the court's refusal and failure, upon its decision in this case, to make the findings of fact requested by the plaintiff in its amended request for findings of fact filed on April 8, 1930.

(3) The plaintiff excepts and objects to the court's decision and finding that the defendant is entitled to judgment in its favor.

(4) The plaintiff excepts and objects to the court's refusal and failure to find that during the taxable years ended June 30, 1923 and 1924, the plaintiff was, within the meaning of section 1000 of the revenue act of 1921, an insurance company subject to the tax imposed by section 243 or 246 of the revenue act of 1921.

(5) The plaintiff excepts and objects to the court's refusal and failure to find that during the taxable year beginning July 1, 1924, and ending June 30, 1925, the plaintiff was, within the meaning of section 700 of the revenue act of 1924, an insurance company subject to the tax imposed by section 243 or 246 of the revenue act of 1924.

(6) The plaintiff excepts and objects to the court's refusal and failure to find that during the taxable years ending June 30, 1923 and 1924, the plaintiff was not subject to the capital stock tax imposed by section 1000 of the revenue act of 1921.

79 (7) The plaintiff excepts and objects to the court's refusal and failure to find that during the taxable year beginning

July 1, 1924, and ending June 30, 1925, the plaintiff was not subject to the capital stock tax imposed by section 700 of the revenue act of 1924.

(8) The plaintiff excepts and objects to the court's refusal and failure to find that the capital stock tax in the sum of $1,392 for the taxable year ended June 30, 1923, was erroneously and illegally assessed and collected and the plaintiff is entitled to recover said sum from the defendant with interest from February 4, 1926.

(9) The plaintiff excepts and objects to the court's refusal and failure to find that the capital stock tax in the sum of $1,850 for the taxable year ended June 30, 1924, was erroneously and illegally assessed and collected and the plaintiff is entitled to recover said sum from the defendant with interest from February 4, 1926.

(10) The plaintiff excepts and objects to the court's refusal and failure to find that the capital stock tax in the sum of $2,144 for the taxable year ended June 30, 1925, was erroneously and illegally assessed and collected and the plaintiff is entitled to recover said sum from the defendant with interest from February 4, 1926.

(11) The plaintiff excepts and objects to the court's holding that during the taxable years ended June 30, 1923 and 1924, the plaintiff was not, within the meaning of section 1000 of the revenue act of 1921, an insurance company subject to the tax imposed by section 243 or 246 of the revenue act of 1921.

80 (12) The plaintiff excepts and objects to the court's holding that during the taxable year beginning July 1, 1924, and ending June 30, 1925, the plaintiff was not, within the meaning of section 700 of the revenue act of 1924, an insurance company subject to the tax imposed by sections 243 or 246 of the revenue act of 1924.

(13) The plaintiff excepts and objects to the court's holding that during the taxable years ended June 30, 1923 and 1924, the plaintiff was subject to the capital stock tax imposed by section 1000 of the revenue act of 1921.

(14) The plaintiff excepts and objects to the court's holding that during the taxable year beginning July 1, 1924, and ending June 30, 1925, the plaintiff was subject to the capital stock tax imposed by section 700 of the revenue act of 1924.

(15) The plaintiff excepts and objects to the court's holding that the capital stock tax in the sum of $1,392, for the taxable year ended June 30, 1923, was properly and legally collected from the plaintiff.

(16) The plaintiff excepts and objects to the court's holding that the capital stock tax in the sum of $1,850, for the taxable year ended June 30, 1924, was properly and legally collected from the plaintiff.

(17) The plaintiff excepts and objects to the court's holding that the capital stock tax in the sum of $2,144, for the taxable year ended June 30, 1925, was properly and legally collected from the plaintiff.

81 (18) The plaintiff excepts and objects to the court's decision and finding that the plaintiff is not entitled to judgment in its favor.

Dated, New York, N. Y., August 5, 1930.

WEILL, WOLFE & SATTERLEE,
Attorneys for Plaintiff,

Office & P. O. Address, No. 52 William Street, Borough of Manhattan, New York, N. Y.

To HOWARD W. AMELI, Esq.,
United States Attorney, Attorney for Defendant,
United States Court House, Post Office Building,
Brooklyn, N. Y.

Hon. WILLIAM D. MITCHELL,
Attorney General of the United States,
Washington, D. C.

PERCY G. B. GILKES, Esq.,
Clerk of the United States District Court,
for the Eastern District of New York,
United States Court House, Post Office Building,
Brooklyn, N. Y.

82 *Plaintiff's exceptions to conclusions of law*

In United States District Court

[Title omitted.]

(1) The plaintiff hereby excepts and objects to the court's holding that during the taxable years ended June 30, 1923 and 1924, the plaintiff was not, within the meaning of section 1000 of the revenue act of 1921, an insurance company subject to the tax imposed by section 243 or 246 of the revenue act of 1921.

(2) The plaintiff excepts and objects to the court's holding that during the taxable year beginning July 1, 1924, and ending June 30, 1925, the plaintiff was not, within the meaning of section 700 of the revenue act of 1924, an insurance company subject to the tax imposed by section 243 or 246 of the revenue act of 1924.

(3) The plaintiff excepts and objects to the court's holding that during the taxable years ended June 30, 1923 and 1924, the plaintiff was subject to the capital stock tax imposed by section 1000 of the revenue act of 1921.

83 (4) The plaintiff excepts and objects to the court's holding that during the taxable year beginning July 1, 1924, and ending June 30, 1925, the plaintiff was subject to the capital stock tax imposed by section 700 of the revenue act of 1924.

(5) The plaintiff excepts and objects to the court's holding that the capital stock tax in the sum of $1,392 for the taxable year ended June 30, 1923, was properly and legally collected from the plaintiff.

(6) The plaintiff excepts and objects to the court's holding that the capital stock tax in the sum of $1,850 for the taxable year ended June 30, 1924, was properly and legally collected from the plaintiff.

(7) The plaintiff excepts and objects to the court's holding that the capital stock tax in the sum of $2,144 for the taxable year ended June 30, 1925, was properly and legally collected from the plaintiff.

(8) The plaintiff excepts and objects to the court's decision and finding that the defendant is entitled to judgment in its favor and excepts further to the direction of judgment in favor of the defendant.

(9) The plaintiff excepts and objects to the court's failure and refusal to make the following conclusions of law as proposed by the plaintiff:

Conclusions of law numbered 1, 2, 3, 4, 5, 6, and 7, respectively.

And further excepts and objects to the court's failure and refusal to direct the entry of judgment against the defendant and in favor of the plaintiff for the amount of $5,386, with interest
84 from February 4, 1926, and costs and disbursements of this action.

Dated, New York, August 13, 1930.

HUGH SATTERLEE,
Attorney for the Plaintiff.

52 William Street, Borough of Manhattan, New York, N. Y.

In United States District Court

Consent

I hereby consent to the settling, allowing, and filing of the within, together with the exhibits offered in evidence as and for the plaintiff's bill of exceptions.

Dated, New York, November 1, 1930.

HOWARD W. AMELI,
United States Attorney,
Attorney for Defendant.

85 *Exhibits*

EXHIBIT A

Copy of certificate of incorporation of the plaintiff, with all amendments thereto.

EXHIBIT B

MT-CST-1 NY-3752-GCD

MAR. 20, 1926.

HOME TITLE INSURANCE COMPANY,
51 Willoughby Street, Brooklyn, New York.

Claim	List	P.	L.	Amount
R31974	October, 1925	1	5	$1,392
R31975	December, 1923	1	5	1,850
R31976	October, 1925	1	6	2,144

GENTLEMEN:

Reference is made to your claims for the refunding of capital stock tax for the taxable periods ended June 30, 1923, June 30, 1924, and June 30, 1925, respectively.

The organization claims that it is an insurance company and as such is not liable for capital stock tax. The records of this office show that the company previously filed a claim for the abatement of capital stock tax for the taxable period ended June 30, 1924, and that the claim was rejected for the reasons set forth in office letter of December 16, 1925, a copy of which is enclosed.

Inasmuch as no evidence has been furnished to alter the position previously taken, there is no alternative but to reject the claims.

Respectfully,

(Signed) D. H. BLAIR,
Commissioner.

MB
Copy O. L.
12-16-25.

86

EXHIBIT C

Copy of capital stock tax return filed by the plaintiff for the period beginning July 1, 1922, and ending June 30, 1923.

EXHIBIT D

Copy of claim filed by the plaintiff for the refund of the capital stock tax paid by it for the year ended June 30, 1923.

EXHIBIT E

Copy of capital stock tax return filed by the plaintiff for the period beginning July 1, 1923, and ending June 30, 1924.

EXHIBIT F

Copy of claim filed by the plaintiff for the refund of the capital stock tax paid by it for the year ended June 30, 1924.

87 EXHIBIT G

This exhibit is the same as Exhibit B.

EXHIBIT H

Copy of capital-stock tax return filed by the plaintiff for the period beginning July 1, 1924, and June 30, 1925.

EXHIBIT I

Copy of claim filed by the plaintiff for the refund of the capital-stock tax paid by it for the year ended June 30, 1925.

EXHIBIT J

This exhibit is the same as Exhibit B herein.

88 EXHIBIT K

Fee / Mortgage } Application No. ____ Reissue of ____ Dated _____ 192__

Purchase price $_____ Examination fee $_____

1. Applicant ____ Mortgage ____ $_____ Conveyancing $_____

_____ Recording fees $_____

Address _____ Recording tax $_____

2. Insure _____ Address _____ Survey _____ $_____

_____ Federal tax _____ $_____

3. Title in _____ To fee address _____ Tax search _____ $_____

4. Title in _____ To mtg. _____

Premises _____

_____

Existing mortgages, $_____

Building _____ Occupied by _____

To be reported _____ 192__ to _____

To close _____ M _____ 192__ at office of _____

_____

Papers left with Co. _____

The undersigned hereby applies to Home Title Insurance Company for the examination of the title to the above-described premises and agrees to pay the scheduled fees and disbursements therefor whether the title be approved or not. If said title be approved, a policy of title insurance for the above sum, which the undersigned represents is the purchase price of said premises (if the premises is being purchased), the amount of the mortgage (if the loan is being made), or at least, the assessed value of the premises (if a policy in possession if applied for), will be issued, subject to existing encumbrances. The company will not insure against State and municipal department violations, enforcement of governmental police power or of the national or State prohibition act, or the lien of decedent's

debts, nor will it insure against any state of facts a survey would show unless it is directed to procure a survey. The statements herein made are correct and true to the belief of the undersigned. If, before the closing of the title, the applicant or the undersigned should acquire any information as to defects, objections or encumbrances affecting said title, they will at once fully inform the company thereof.

[OVER.]

EXHIBIT K (REVERSE SIDE)

Remarks---

Section ------ Block ------

Tenement-house department search ---

Inspection ---

Building department search ---

89 EXHIBIT L

Copy of policy of title insurance issued by the plaintiff which, except for the "conditions of this policy," reads as follows:

Home Title Insurance Company, 51 Willoughby Street, 1550 Flatbush Avenue, Brooklyn

20 Herriman Avenue, Jamaica	Home Title Building, Mineola	Bridge Plaza North, Long Island City	Home Title Building, Riverhead

No.

This policy of insurance witnesseth: That the Home Title Insurance Company in consideration of the payment of its charges for the examination of title, insures heirs and devisees, against all loss or damage not exceeding dollars which the insured shall sustain by reason of any defect or defects of title affecting the premises described in Schedule A, hereto annexed, or affecting the interest of the insured therein, as described in said schedule, or by reason of unmarketability of the title of the insured to or in said premises, or by reason of liens or incumbrances charging the same at the date of this policy; excepting judgments against the insured and estates, defects, objections, liens or incumbrances created by the act or with the privity of the insured; saving all loss and damage by reason of the estates, interests, defects, objections, liens, and incumbrances excepted in Schedule B, or by the conditions of this policy, hereto annexed and hereby incor-
90 porated into this contract, or by reason of any restrictions

imposed by the city of New York, the loss and the amount to be ascertained in the manner provided in said conditions and to be payable upon compliance by the insured with the stipulations of said conditions, and not otherwise.

In witness whereof, the Home Title Insurance Company has caused its corporate seal to be hereunto affixed and these presents to be signed by two of its officers this

Vice President.

Attest,

Assistant Secretary.

Schedule A

1. The estate or interest of the insured in the premises described below, covered by this policy.

2. The deed or other means by which the estate or interest covered by this policy is vested in the insured.

3. The premises in which the insured has the estate or interest covered by this policy.

Schedule B

This policy does not insure against such estates, interests, defects, objections to title, charges, and incumbrances, affecting such premises, or the estate or interest insured as are set forth below in this schedule.

91 EXHIBIT M

Title service application No. ____ Reissue of ____ Dated _____ 192__

1. Applicant _____ Address _____ Examination fee, $_____
2. Insure Home Title Insurance Company and its assignees to mortgage loan $___ year ___ % on advances ___ % thereafter_____ Inspections and appraisal fee__ $_____ Conveyancing___ $_____ Recording fees__ $_____
3. Insure_____ to fee, $_____ Recording tax __ $_____
4. Title in_____ Survey_____ $_____
   Premises_____ Federal tax ____ $_____
   Existing mortgages, $_____

To be reported _____ 192__ to_____
To close _____ M _____ 192__ at office of company.
Applicant's broker:
Papers left with Co. _____ Fire insurance broker: _____

The undersigned, having applied to Home Title Insurance Company for a loan as above set forth, which loan is not to be made unless title is satisfactory to said company, hereby applies to said company for the examination of the title and agrees to pay the fees and disbursements above set forth on the date above fixed for closing

said loan, whether said loan is made or not. The undersigned also agrees to pay all future installments of assessments, whether liens or not, before the loan is made.

The undersigned hereby authorizes said company to obtain fire insurance for $------, in any corporations authorized to do business in New York, on the buildings to be covered by the mortgage, from the date of closing of said loan until it is fully paid, and agrees to pay the premium to the date of the maturity of the loan, at the time of closing.

---------- *Applicant.*

EXHIBIT M (REVERSE SIDE)

Loan of $----------
Approved by Ex. Com. ---------- 192--

Section---------- Block----------

Land $----------
Building $----------
Insurance----------
Tenement house dept. sch----------
Bldg. dept. sch----------
Inspection----------

92 EXHIBIT N

Home Title Insurance Company, 51 Willoughby Street, 1550 Flatbush Avenue, Brooklyn

Home Title Building, Mineola

Home Title Building, Riverhead

20 Herriman Avenue, Jamaica

Guarantee No.

Home Title Insurance Company (hereinafter termed "the company"), in consideration of the premium and agreements hereinafter set forth, hereby guarantees to

Address:

and to such subsequent owners of the bond and mortgage described in Schedule "A" hereof, as shall give to the company prompt notice and proof of such ownership (all of whom are hereinafter termed "the insured"):

First: Payment of the interest on the said bond and mortgage at the rate of per centum per annum, from , when the same becomes due under the terms hereof.

Second: Payment of the principal of the said bond and mortgage as soon as collected, and in any event within twelve months after the same becomes due under the terms hereof, with regular payment meanwhile of the interest at the rate hereby guaranteed.

93 Third: To continue this guarantee on any extension of the said mortgage to which the company shall consent in writing.

Fourth: That the said mortgage is a valid first lien upon a good and marketable title in fee to the property described in Schedule "A."

Fifth: To keep the mortgaged premises insured against fire, and to enforce prompt payment of all fire insurance premiums and all taxes, assessments, and water rates which may become liens thereon.

Sixth: To conduct without expense to the insured all actions or proceedings that it may deem necessary to take in connection with this guarantee, or the said bond or mortgage, and any action that may be brought against the insured as the owner thereof.

By the acceptance of this guarantee the insured agrees—

1. That the company is the agent of the insured to collect all the interest and principal secured by said bond and mortgage, and to exercise and enforce any right or option secured to the insured thereby, and by any policy of fire insurance upon the premises covered by said mortgage, and to bring in the name of the insured any action that may be necessary in connection therewith, and to receive any proceeds thereof.

2. To refrain from collecting any part of the said interest or principal, and from exercising any right or option secured by the said bond or mortgage, or by any policy of fire insurance covering the mortgaged premises, and from doing anything which in any

94 way affects the validity or the security, or the terms of the said bond and mortgage.

3. To permit the company to retain as its premium for this guarantee all interest collected in excess of the rate hereby guaranteed, and to have possession of all fire insurance policies covering the mortgaged premises.

4. To produce and deposit the said bond and mortgage with the company upon its request, and to render such reasonable assistance as the company may require in any proceedings taken in connection therewith.

5. To notify the company in writing promptly of any action or proceeding affecting said bond or mortgage and to forward to the company promptly any notice relating to any policy of fire insurance affecting the mortgaged premises.

6. To assign said bond and mortgage to the company if requested, upon receipt from it of the full amount due the insured, whenever under the terms thereof payment of the principal may be demanded.

General provisions

All notices required or given under this guarantee by the insured to the company, or by the company to the insured, shall be in writing and may be sent by mail.

Notices from the company to the insured shall be sent to the address stated above or to any other address of which the company shall have received written notice.

Notices from the insured to the company shall be sent to its principal office in the Borough of Brooklyn, in the city of New
95 York, and all payments by this company shall be made at the same place.

In witness whereof, the said company has caused its corporate seal to be hereto affixed and these presents to be signed by two of its officers, this

HOME TITLE INSURANCE COMPANY,
Vice-President.
Assistant Secretary.

Schedule "A"

The bond covered by this guarantee is made by to the Home Title Insurance Company, dated , and is marked for identification with the number of this guarantee and the signature of one of the officers of the company. It is given for the payment of $ on the day of 19 , with interest, payable on the

The mortgage given to secure said bond is similarly identified and is made by to the Home Title Insurance Company, dated , and was recorded

The real property covered by said mortgage is the following:

96 EXHIBIT O

Home Title Insurance Company, 51 Willoughby Street, Brooklyn

Guaranteed first mortgage certificate

Guarantee No. C 00000 $ Loan No.

Home Title Insurance Company (hereinafter termed "the company") hereby certifies that it has received from (hereinafter termed "the purchaser") the sum of dollars. for the purchase of, and hereby assigns to the purchaser, an undivided share or interest to the extent of said sum in the bond made by for $, dated , due , and in the first mortgage securing the same, covering premises with interest guaranteed at the rate of per centum per annum from

the date hereof, payable on the first days of and in each year.

The company guarantees the payment of the principal of said sum as soon as collected, and in any event within twelve months after the same becomes due, with regular payments meanwhile of interest at the rate hereby guaranteed.

This certificate may be assigned by endorsement thereon, but only when such assignment is registered on the books of the company.

The company further certifies that it holds said bond and mortgage together with any guaranties of payment, insurance
97 policies and other instruments and evidences of title relating thereto, for the benefit of the purchaser and of any other persons interested in said bond and mortgage, and further that the share or interest represented by this certificate is not subordinate to any other shares in said bond and mortgage, and is not subject to any prior interests therein, and that the total of this and similar certificates shall never aggregate more than the amount of principal remaining unpaid upon the said bond and mortgage, which is a valid first lien upon the real property therein described.

The following conditions are hereby mutually agreed upon between the company and the purchaser:

First: The company shall collect the interest and principal of said bond and mortgage and shall retain as its premium all interest collected in excess of the rate hereby guaranteed.

Second: The company shall have full and exclusive power to take any action it may deem necessary or desirable in order to enforce any of the provisions of said bond and mortgage and fire-insurance policies and to protect the mortgage security, and may satisfy and discharge said mortgage on receiving full payment thereof and may use for, collect or compromise the fire insurance in case of loss by fire.

Third: The company may take up and cancel this certificate at any time on thirty days' notice in writing to the purchaser and payment of the amount owing for principal and interest. All notices to the company must be in writing and must be sent to its principal office in the Borough of Brooklyn, City of New York, and all payments by the company shall be made at same place.

98 In witness whereof, the company has caused its corporate seal to be hereunto affixed and these parents to be signed by one of its officers.

Dated, Entered

HOME TITLE INSURANCE COMPANY CASHIER by
SPECIMEN.

Registered

EXHIBIT P

Copy of the income-tax return, together with the schedules attached thereto, filed by the plaintiff for the calendar year 1921.

EXHIBIT Q

Copy of the income-tax return, together with the schedules attached thereto, filed by the plaintiff for the calendar year 1922.

EXHIBIT R

Copy of the income-tax return, together with the schedules attached thereto, filed by the plaintiff for the calendar year 1923.

99 EXHIBIT S

Copy of the income tax return, together with the schedules attached thereto, filed by the plaintiff for the calendar year 1924.

EXHIBIT T

Copy of the income tax return, together with the schedules attached thereto, filed by the plaintiff for the calendar year 1925.

EXHIBIT U

Copy of claim for abatement filed by the plaintiff on or about April 1, 1924.

EXHIBIT V

Copy of letter of the Commissioner of Internal Revenue, addressed to the plaintiff bearing date of January 13, 1925, and the symbols MT-CST-1 N.Y.-3752-GCD CL-A59803.

EXHIBIT W

Copy of letter of the plaintiff addressed to the Commissioner of Internal Revenue bearing date of January 27, 1925.

100 EXHIBIT X

Copy of letter of the Commissioner of Internal Revenue addressed to the plaintiff, bearing date of February 12, 1925, and the symbols MT-CST-1 N.Y.-3752-GCD C 1-A59803.

EXHIBIT Y

Copy of letter of the plaintiff addressed to the Commissioner of Internal Revenue bearing date of March 4, 1925.

EXHIBIT Z

Copy of the plaintiff's by-laws in effect during the calendar years 1921, 1922, and 1923.

EXHIBIT YY

Copy of letter of the Commissioner of Internal Revenue addressed to the plaintiff bearing date of December 16, 1925, and the symbols MT–CST–1 N.Y.–3752–GCD.

EXHIBIT 1

Copy of mortgage guarantee of the First Mortgage Guaranty Company.

101 EXHIBIT 2

Copy of guaranteed first-mortgage participation certificate of the First Mortgage Guaranty Company.

EXHIBIT 3

Copy of mortgage guarantee of the Guranteed Mortgage Company of New York.

EXHIBIT 4

Copy of guaranteed first-mortgage certificate of the Guranteed Mortgage Company of New York.

EXHIBIT 5

Copy of application for a first-mortgage loan of the Guaranteed Mortgage Company of New York.

102 *Order dispensing with printing of certain exhibits*

In United States Circuit Court of Appeals for the Second Circuit

HOME TITLE INSURANCE COMPANY, PLAINTIFF-APPELLANT

against

THE UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Upon the annexed consent and on motion of Weill, Wolff & Satterlee, attorneys for the plaintiff-appellant, it is hereby

Ordered that the following exhibits need not be printed in the record on appeal, but the same may be referred to on the argument and shall be deemed as part of said record as if printed therein, and any such exhibit or exhibits may be submitted to the Circuit Court on the argument of the appeal by either side.

Exhibit A—Copy of certificate of incorporation of the plaintiff-appellant, with all amendments thereto.

Exhibit C—Copy of capital stock tax return filed by the plaintiff-appellant for the period beginning July 1, 1922, and ending June 30, 1923.

Exhibit D—Copy of claim filed by the plaintiff-appellant for the refund of the capital stock tax paid by it for the year ended June 30, 1923.

103 Exhibit E—Copy of capital stock tax return filed by the plaintiff-appellant for the period beginning July 1, 1923, and ending June 30, 1924.

Exhibit F—Copy of claim filed by the plaintiff-appellant for the refund of the capital stock tax paid by it for the year ended June 30, 1924.

Exhibit G—This exhibit is the same as Exhibit B.

Exhibit H—Copy of capital stock tax return filed by the plaintiff-appellant for the period beginning July 1, 1924, and June 30, 1925.

Exhibit I—Copy of claim filed by the plaintiff-appellant for the refund of the capital stock tax paid by it for the year ended June 30, 1925.

Exhibit J—This exhibit is the same as Exhibit B herein.

Exhibit L—Copy of policy of title insurance issued by the plaintiff-appellant.

Exhibit P—Copy of the income-tax return, together with the schedules attached thereto, filed by the plaintiff-appellant for the calendar year 1921.

Exhibit Q—Copy of the income-tax return, together with the schedules attached thereto, filed by the plaintiff-appellant for the calendar year 1922.

Exhibit R—Copy of the income-tax return together with the schedules attached thereto, filed by the plaintiff for the calendar year 1923.

104 Exhibit S—Copy of the income-tax return, together with the schedules attached thereto, filed by the plaintiff-appellant for the calendar year 1924.

Exhibit T—Copy of the income-tax return, together with the schedules attached thereto, filed by the plaintiff-appellant for the calendar year 1925.

Exhibit U—Copy of claim for abatement filed by the plaintiff-appellant on or about April 1, 1924.

Exhibit V—Copy of letter of the Commissioner of Internal Revenue, addressed to the plaintiff-appellant bearing date of January 13, 1925, and the symbols MT–CST–1 NY–3752–GCD CL–A59803.

Exhibit W—Copy of letter of the plaintiff-appellant addressed to the Commissioner of Internal Revenue bearing date of January 27, 1925.

Exhibit X—Copy of letter of the Commissioner of Internal Revenue addressed to the plaintiff, bearing date of February 12, 1925, and the symbols MT–CST–1 NY–3752–GCD C 1–A59803.

Exhibit Y—Copy of letter of the plaintiff-appellant addressed to the Commissioner of Internal Revenue bearing date of March 4, 1925.

Exhibit Z—Copy of the plaintiff-appellant's by-laws in effect during the calendar years 1921, 1922, and 1923.

Exhibit YY—Copy of letter of the Commissioner of Internal Revenue addressed to the plaintiff-appellant bearing date of December 16, 1925, and the symbols MT–CST–1 NY–3752–GCD.

Exhibit 1—Copy of mortgage guarantee of the First Mortgage Guaranty Company.

105 Exhibit 2.—Copy of guaranteed first mortgage participation certificate of the First Mortgage Guaranty Company.

Exhibit 3.—Copy of mortgage guarantee of the Guaranteed Mortgage Company of New York.

Exhibit 4.—Copy of guaranteed first mortgage certificate of the Guaranteed Mortgage Company of New York.

Exhibit 5.—Copy of application for a first moregage loan of the Guaranteed Mortgage Company of New York.

Dated, New York, October 15, 1930.

MANTON,
United States Circuit Judge.

Entry of the foregoing order is hereby consented to without further notice.

Dated, New York, October 15, 1930

HOWARD W. AMELI,
United States Attorney,
Attorney for Defendant-Appellee.

WEILL, WOLFF & SATTERLEE,
Attorneys for Plaintiff-Appellant.

106 In United States District Court

L–3547

HOME TITLE INSURANCE COMPANY, PLAINTIFF
against
UNITED STATES OF AMERICA, DEFENDANT

Order for judgment

June 24, 1930

The above-entitled action having come regularly on to be heard before the Honorable Clarence G. Galston, one of the judges of the United States District Court for the Eastern District of New York, having commenced and concluded on the 24th day of Feb-

ruary, 1930, the facts in the case having theretofore been stipulated by and between the attorneys for the respective parties, and Messrs. Weill, Wolff & Satterlee, appearing for the plaintiff by Hugh Satterlee and I. Herman Sher, Esqs., of counsel, and Howard W. Ameli, United States attorney for the Eastern District of New York, appearing for the defendant, E. H. Horton and Albert D. Smith, Esqs., of counsel, and after due deliberation having
107 been had thereon, the court made and filed its decision on the 11th day of June, 1930.

Now, on motion of Howard W. Ameli, United States attorney for the Eastern District of New York, attorney for the defendant, it is

Ordered, adjudged, and decreed that the motion for judgment on behalf of the defendant, heretofore submitted on the trial of the above-entitled action, be, and the same hereby is, granted; and it is further

Ordered, adjudged, and decreed that the United States of America, the defendant above named, have judgment against the Home Title Insurance Company, the plaintiff herein, dismissing the action, together with costs and disbursements of this action.

CLARENCE G. GALSTON,
U. S. D. J.

108 *Judgment*

In United States District Court, Eastern District of New York

No. L-3547

HOME TITLE INSURANCE COMPANY, PLAINTIFF

against

THE UNITED STATES OF AMERICA, DEFENDANT

This court having by an order dated June 24th, 1930, ordered judgment in favor of the defendant and against the plaintiff, dismissing the complaint on the merits with costs to be taxed, and the costs having been duly adjusted at the sum of twenty and 00/100 ($20.00) dollars,

Now, on motion of Howard W. Ameli, United States attorney for the Eastern District of New York, it is

Ordered and adjudged that the United States of America, defendant, sued herein, have judgment against the plaintiff, Home Title Insurance Company, dismissing the complaint of the plaintiff herein on the merits, together with costs amounting to twenty and 00/100 ($20.00) dollars and that it have execution therefor.

Judgment signed and entered this 16th day of August, 1930.

PERCY G. B. GILKES,
Clerk.

By J. O. COCHRANE,
Deputy Clerk.

109 In United States District Court

[Title omitted.]

Notice and allowance of appeal

SIRS:

You will please take notice, that Home Title Insurance Company, the plaintiff herein, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the order of the United States District Court for the Eastern District of New York, entered herein on the 24th day of June, 1930, granting the motion for judgment on behalf of the defendant, theretofore submitted on the trial of the above-entitled action, and adjudging that the defendant have judgment against the plaintiff, dismissing the action, together with costs and disbursements thereof, and from the judgment at law of the United States District Court for the Eastern District of New York, entered herein pursuant to said order on the 16th day of August, 1930, in the office of the Clerk of said United States District Court in favor of the defendant and against the plaintiff dismissing the complaint herein on the merits, together with costs amounting to
110 $20, and from each and every part of said order and judgment, respectively, as well as from the whole thereof.

Dated, New York, August 27, 1930.

HUGH SATTERLEE,
WEILL, WOLFF & SATTERLEE,
Attorneys for Plaintiff.

Office and post-office address, 52 William Street, Borough of Manhattan, New York, N. Y.

To HOWARD W. AMELI, Esq.,
United States Attorney, Attorney for Defendant,
United States Court House, Post Office Building,
Brooklyn, New York.

Hon. WILLIAM D. MITCHELL,
Attorney General of the United States,
Washington, D. C.

PERCY G. B. GILKES, Esq.,
Clerk of the United States District Court
for the Eastern District of New York,
United States Court House, Post Office Building,
Brooklyn, New York.

The above appeal as prayed for is hereby allowed and the amount of the cost bond to be filed by the plaintiff herein is hereby fixed at $250.

August 27, 1930.

MARCUS B. CAMPBELL,
Judge of the United States District Court
for the Eastern District of New York.

111 [Citation in usual form omitted in printing.]

112 In United States District Court

Assignment of errors

[Title omitted.]

Now comes Home Title Insurance Company, the plaintiff in the above-entitled action, and in connection with its petition and claim of appeal to the Circuit Court of Appeals for the Second Circuit, says that in the record, proceedings, and judgment in the above-entitled cause manifest error has intervened to its prejudice, and assigns for error the following:

1. The court erred in failing to separately state its findings of fact and conclusions of law, as requested by the parties herein in their agreed statement of facts.

2. The court erred in failing to make the findings of fact requested by the plaintiff in its amended request for findings of fact filed on April 8, 1930.

3. The court erred in directing judgment in favor of the defendant and against the plaintiff upon all the facts found.

4. The court erred in granting the defendant's motion for
113 the entry of judgment in its favor dismissing the complaint upon all the facts found.

5. The court erred in holding that during the taxable years ended June 30, 1923 and 1924, the plaintiff was not, within the meaning of section 1000 of the revenue act of 1921, an insurance company subject to the tax imposed by section 243 or 246 of the revenue act of 1921.

6. The court erred in holding that during the taxable year beginning July 1, 1924, and ending June 30, 1925, the plaintiff was not, within the meaning of section 700 of the revenue act of 1924, an insurance company subject to the tax imposed by section 243 or 246 of the revenue act of 1924.

7. The court erred in holding that during the taxable years ended June 30, 1923 and 1924, the plaintiff was subject to the capital stock tax imposed by Section 1000 of the revenue act of 1921.

8. The court erred in holding that during the taxable year beginning July 1, 1924, and ending June 30, 1925, the plaintiff was subject to the capital stock tax imposed by section 700 of the revenue act of 1924.

9. The court erred in holding that the capital stock tax in the sum of $1,392 for the taxable year ended June 30, 1926, was properly and legally collected from the plaintiff.

10. The court erred in holding that the capital stock tax in the sum of $1,850 for the taxable year ended June 30, 1924, was properly and legally collected from the plaintiff.

11. The court erred in holding that the capital stock tax in
114 the sum of $2,144 for the taxable year ended June 30, 1925, was properly and legally collected from the plaintiff.

12. The court erred in failing to hold that during the taxable years ended June 30, 1923 and 1924, the plaintiff was, within the meaning of section 1000 of the revenue act of 1921, an insurance company subject to the tax imposed by section 243 or 246 of the revenue act of 1921.

13. The court erred in failing to hold that during the taxable year beginning July 1, 1924, and ending June 30, 1925, the plaintiff was, within the meaning of section 700 of the revenue act of 1924, an insurance company subject to the tax imposed by section 243 or 246 of the revenue act of 1924.

14. The court erred in failing to hold that during the taxable years ended June 30, 1923 and 1924, the plaintiff was not subject to the capital stock imposed by section 1000 of the revenue act of 1921.

15. The court erred in failing to hold that during the taxable year beginning July 1, 1924, and ending June 30, 1925, the plaintiff was not subject to the capital stock tax imposed by section 700 of the revenue act of 1924.

16. The court erred in failing to hold that the capital stock tax in the sum of $1,392 for the taxable year ended June 30, 1923, was erroneously and illegally assessed and collected and that the plaintiff is entitled to recover said sum from the defendant with interest from February 4, 1926.

17. The court erred in failing to hold that the capital stock tax in the sum of $1,850 for the taxable year ended June 30, 1924, was erroneously and illegally assessed and collected and that the
115 plaintiff is entitled to recover said sum from the defendant with interest from February 4, 1926.

18. The court erred in failing to hold that the capital stock tax in the sum of $2,144 for the taxable year ended June 30, 1925, was erroneously and illegally assessed and collected and that the plaintiff is entitled to recover said sum from the defendant with interest from February 4, 1926.

19. The court erred in failing to direct the entry of judgment against the defendant and in favor of the plaintiff for the amount of $5,386, with interest from February 4, 1926, upon all the facts found.

Wherefore the said plaintiff, Home Title Insurance Company, prays that the judgment herein in favor of the defendant may be

reversed and held for naught and that said plaintiffq may be restored to all things which it has lost by reason of said judgment.

Dated, New York, N. Y., August 27, 1930.

HUGH SATTERLEE,
WEILL, WOLFF & SATTERLEE,
Attorneys for Plaintiff.

Office & P. O. address, No. 52 William Street, Borough of Manhattan, New York, N. Y.

116 [Bond on appeal for $250.00 approved; omitted in printing.].

117–121 [Omitted.]

122 In United States District Court

Order extending time to perfect appeal

[Title omitted.]

It is hereby stipulated and agreed that the time of the defendant-appellee, the United States of America, to serve upon the appellant its proposed changes, additions, or amendments under rule 26 of the Rules of the United States District Court for the Eastern District of New York, be extended to and including the 27th day of September, 1930; and it is further

Stipulated and agreed that the time of the plaintiff-
123 appellant to settle and file its bill of exceptions and transcript of record herein, and to docket the above-named case, and to print, serve and file its transcript of record on appeal, is extended to and including the 26th day of October, 1930; and it is further

Stipulated and agreed that the June, 1930, term of this court during which the plaintiff-appellant may settle, serve, and file its bill of exceptions and transcript of the record be extended to and including the 26th day of October, 1930.

Dated, Brooklyn, New York, September 10, 1930.

WEILL, WOLFF & SATTERLEE,
Attorneys for Plaintiff-Appellant.
HOWARD W. AMELI,
United States Attorney.
By HERBERT H. KELLOGG,
Assistant U. S. Attorney.

So ordered.

GROVER M. MOSCOWITZ,
U. S. D. J.

124 In United States District Court

[Title omitted.]

Order settling transcript of record.

The plaintiff-appellant having in due time served its proposed record and bill of exceptions on defendant-appellee; the latter having in due time proposed amendments thereto numbered 1 to 7, inclusive; plaintiff-appellant having in due time accepted amendments numbered 4 and 7, respectively, and served notice of its rejection of all other of said proposed amendments, and plaintiff-appellant having further in due time served notice on defendant-appellee that it would move before Hon. Clarence G. Galston at his chambers in the Eagle Building, Johnson and Adams Streets, Borough of Brooklyn, City of New York, on the 1st day of October, 1930, at 10.30 o'clock in the forenoon, or as soon thereafter as counsel may be heard, for an order settling and determining the said objections and exceptions to the proposed record on appeal herein and for such other and further relief as may be proper in the premises; and the time for the
125 hearing of said motion having been adjourned to and including the 8th day of October, 1930, by stipulation of the parties,

Now, on motion of Weill, Wolff & Satterlee, attorneys for the plaintiff-appellant,

It is hereby certified that the record and bill of exceptions proposed by the plaintiff-appellant, together with the amendments thereto numbered 4 and 7 proposed by the defendant-appellee, constitute a correct copy of the transcript of record of the District Court of the United States of America for the Eastern District of New York in the above-entitled matter, and the same is hereby settled as the case herein and is hereby ordered to be filed in the office of the clerk of this court.

Dated, October 8th, 1930.

CLARENCE G. GALSTON,
U. S. D. J.

126 In United States District Court

[Title omitted.]

Order extending time to perfect appeal

It is hereby stipulated and agreed that the time of the plaintiff-appellant to docket the above named case, and to print, serve, and file its transcript of record on appeal is extended to and including the 10th day of November, 1930.

Dated, Brooklyn, N. Y., October 20, 1930.

WEILL, WOLFF & SATTERLEE,
Attorneys for Plaintiff-Appellant.
HOWARD W. AMELI,
United States Attorney,
Attorney for Defendant-Appellee.

So ordered:
CLARENCE G. GALSTON,
U. S. D. J.

127 In United States District Court

[Title omitted.]

Stipulation as to record

It is hereby stipulated and agreed by and between the parties that the foregoing is a true copy of the transcript of record of the said District Court in the above entitled matter as agreed on by the parties.

Dated, New York. November 1, 1930.

HOWARD W. AMELI,
United States Attorney,
Attorney for Defendant-Appellee:
WEILL, WOLFF & SATTERLEE,
Attorneys for Plaintiff-Appellant.

In United States District Court

Order as to record

Upon the above stipulation, it is

Ordered that the foregoing printed record be filed for use by the clerk of this court in lieu of the original papers in certifying a record on appeal.

Dated, Brooklyn, N. Y., November 3, 1930.

CLARENCE G. GALSTON,
U. S. D. J.

128 [Clerk's certificate to foregoing transcript omitted in printing.]

129 In United States Circuit Court of Appeals for the Second Circuit

October term, 1930

No. 225

Argued January 22, 1931. Decided June 1, 1931

HOME TITLE INSURANCE COMPANY, PLAINTIFF-APPELLANT

v.

THE UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the District Court of the United States for the Eastern District of New York

Before MANTON, L. HAND, and SWAN, Circuit Judges

Action by Home Title Insurance Company, a New York corporation, to recover capital stock taxes alleged to have been illegally collected from it for the taxable years ending June 30, 1923, 1924, and

1925, respectively. After trial without a jury on stipulated facts, judgment was entered dismissing the complaint and awarding costs to defendant. The plaintiff appeals. Judgment reversed.

For the opinion below, see (D. C.) 41 F. (2d) 793.

Weill, Wolff & Satterlee, of New York City (Hugh Satterlee and I. Herman Sher, both of New York City, of counsel), for appellant.

Howard W. Ameli, U. S. atty., and Herman H. Kellogg, asst. U. S. atty., both of Brooklyn, N. Y. (C. M. Charest, Gen. Counsel Bureau of Internal Revenue, and E M. Horton, Bureau of Internal Revenue, both of Washington, D. C., of counsel), for the United States.

Opinion

SWAN, Circuit Judge: This is a suit brought in the District Court pursuant to section 24 of the Judicial Code, 28 U. S. C. A. § 41 (20), for the recovery of capital-stock taxes. The taxes in litigation were legally collected if the plaintiff was taxable under section 1000 of the revenue act of 1921 (42 Stat. 294) in respect to the taxable years 1923 and 1924, and under section 700 of the revenue act of 1924 (43 Stat. 325 [26 U. S. C. A. § 223 note]) in respect to the taxable year 1925, but were illegally collected if the plaintiff was an "insurance company subject to the tax imposed by section 246" of said revenue acts (42 Stat. 262; 43 Stat. 290). The court below ruled that it was not an "insurance company" within the meaning of the section last mentioned. The correctness of that ruling is presented by this appeal.

The plaintiff was incorporated in 1906 under article 5 of the insurance law of the State of New York pertaining to title and credit guaranty corporations. New York Laws 1892, c. 690. It is subject to, and has complied with, the regulations of the insurance department of the State, and has regularly filed the annual reports required by law to be filed with the State superintendent of insurance. Its business consists in the insurance of title to real estate and the guaranteeing of real estate mortgages. Because of the Government's contention, which prevailed below, that the plaintiff is not "an insurance company," it is necessary to state in some detail how its business is conducted.

Plaintiff's practice with respect to title insurance is as follows: Upon receiving an application for title insurance, plaintiff searches the record title of the real estate in question, and, if the title is found satisfactory, issues its "Policy of title insurance" in a stated amount against loss due to defect in title. As consideration therefor,
130 it receives payment of its charges for the examination of title; such charges being in accordance with a fixed scale of rates based on the amount of the policy. If the title is disapproved, no policy is issued, but plaintiff collects from the applicant its charges for the examination of title at the same rate as if the policy had been issued in the amount applied for.

Plaintiff's practice in connection with guaranteeing mortgages involves the making of loans by it secured by mortgage on real estate. Upon receipt of an application for a mortgage loan, plaintiff not only searches the title, but makes an inspection and appraisal of the property in question. If the title and the value of the security is found satisfactory, plaintiff prepares a bond and mortgage to be executed by the applicant, and, after recordation of the mortgage, pays the applicant the face amount of the bond less its charges for title examination, appraisal, etc. Thereafter the bond and mortgage are sold by plaintiff, principally to savings banks and insurance companies which apply to it for guaranteed loans, for the face value thereof, accompanied by plaintiff's "policy" of guaranty, the purchaser agreeing that the plaintiff shall collect the interest and principal of the bond and mortgage and shall retain as compensation all interest collected in excess of the rate guaranteed, which is usually one-half of one per cent less than the interest rate expressed in the bond. This excess of interest collected by the plaintiff constitutes the consideration or "premium" for its "policy." By the terms of its policy plaintiff "guarantees" to the purchaser, and to subsequent owners of the bond and mortgage, payment at the guaranteed rate of the interest when due under the terms of the bond and mortgage; payment of the principal thereof when collected, and in any event within twelve months after the same becomes due; that the mortgage is a valid first lien upon a marketable title in fee to the premises described; to enforce prompt payment of fire insurance premiums, taxes, and water rates; and to conduct "without expense to the insured" any litigation involving the bond and mortgage or plaintiff's guaranty. By accepting the policy the insured appoints plaintiff his agent to collect the interest and principal, and agrees to facilitate any litigation plaintiff may engage in respecting the bond and mortgage, to assign the same to plaintiff upon receiving from it payment in full after maturity, and to allow plaintiff to retain from the interest collected its aforesaid "premium." Sometimes, instead of disposing of the bond and mortgage in its entirety, plaintiff sells participations therein and issues what it calls "guaranteed first mortgage certificates." Such a certificate combines an assignment of an undivided part interest in a specified bond and mortgage with a guaranty similar in terms to the regular guaranty policy as to payment of interest and principal of the mortgage, which plaintiff "certifies" is a valid first lien upon the property therein described. Substantially all mortgage loans are disposed of soon after plaintiff acquires them; the average period during which it holds a mortgage before selling it not exceeding two months. The primary purpose of plaintiff in making loans on bonds and mortgages has not been for investment, but for sale guaranteed as aforesaid.

During the taxable years here in question all plaintiff's capital, surplus, and undivided profits were employed indiscriminately in its business activties, and no segregation was made on its books of

account of its expenses as between that portion of its business described as insurance of titles and that portion described as guaranteeing mortgages. Without attempting to determine exactly how much of plaintiff's income should be allocated to insurance of titles and how much to guaranteeing of mortgages (the parties not being in agreement), it will suffice to state that a very substantial part of its income is derived from the latter phase of its business.

Under the law of the State of New York, corporations organized under the banking laws of the State (Consol. Laws N. Y. c. 2) and subject to supervision of the banking department are authorized to make mortgage loans and sell the same with their guaranty, and the record discloses that during the years in question two such corporations were regularly engaged in substantially the same manner as was the plaintiff in selling to the investing public mortgages and participations in mortgages guaranteed by them, except that they did not guarantee title to the mortgaged premises.

If plaintiff's business consisted solely in the insurance of titles, the Government would apparently concede that it was an insurance company subject to tax under section 246. See Sol. Mem. 5501, V–1 C. B. 102; G. C. M. 5355 VII–2 C. B. 160. But it is contended that the guaranteeing of mortgages is not insurance, and the court below so held. The argument runs that a guaranty, i. e., the promise to pay the debt of another, can not be insurance, because it is not a contract of indemnity. Speaking generally, it may be said that a contract of insurance is a contract of indemnity, and many authorities might be cited containing statements to this effect. See United States v. Supplee-Biddle Hardware Co., 265 U. S. 189, 195, 44 S. Ct. 546, 68 L. Ed. 970; Claflin v. U. S. Credit System Co., 165 Mass. 501, 502, 43 N. E. 293, 52 Am. St. Rep. 528; Glendale Woolen Co. v. Protection Ins. Co., 21 Conn. 19, 31, 54 Am. Dec. 309. The statement is true if it means that the insured must have some interest at risk, for otherwise the contract is a wager; but it is not true if construed to mean that the insured can never collect from the insurer more than his actual loss (Empire Development Co. v. Title Guarantee & Trust Co., 225 N. Y. 53, 58, [illegible] N. E. 468), or that the insured must first salvage what he can and then look to the insurer only for the difference. As is well known, it is the common practice of fire and marine insurers to pay in full and take over the physical remnants of the insured property in the event of injury sufficient to constitute a "total loss." They do not indemnify the insured in the sense required by the defendant's argument; rather they pay upon the happening of the condition specified in the policy, and themselves work out the salvage. Similarly, a policy of credit insurance would surely be no less insurance because the contract provided that upon the debtor's default the insurer would pay in full and take over the claim for collection. See Dane v. Mortgage Ins. Co. [1894], 1 Q. B. 54; Shaw v. Royce [1911], 1 Ch. 138. This is in substance what the

131

plaintiff agrees to do in its policies of mortgage guaranty. If the mortgagor pays, the plaintiff will remit as soon as collected, reserving its "premium" from the interest, but in any event it will pay on the date specified in its "policy." It bears the risk of noncollection from the mortgagor.

It may be important at times to distinguish between contracts of "guaranty," "suretyship," or "indemnity," where the rights of the parties to the contract are involved. But where, as here, the question is whether a company engaged in the business of issuing such contracts in large numbers is doing a business of insurance, the answer is not to be found in technical differences of surety and guarantor. There is no hard and fast line between contracts of insurance and contracts of guaranty. Frost, Law of Guaranty Insurance (2d Ed.) 16; Hunt v. New Hampshire Fire Underwriters' Ass'n, 68 N. H. 305, 308, 38 A. 145, 38 L. R. A. 514, 73 Am. St. Rep. 602. Insurance differs from guaranty only as the business of insurance differs from a single contract of guaranty, suretyship, or indemnity. The business of insurance consists in accepting a number of risks, some of which will involve losses, and of spreading such losses over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it. As this court said in Tebbets v. Mercantile Credit Guarantee Co., 73 F. 95, at page 97, in respect to credit insurance: "Corporations entering into contracts like the one at bar may call themselves 'guarantee' or 'surety' companies, but their business is in all essential particulars that of insurers, who, upon careful calculation of the risks of such business, and with such restrictions of their liability, as may seem to them sufficient to make it safe, undertake to assure persons against loss, in return for premiums sufficiently high to make such business commercially profitable. Their contracts are, in fact, policies of insurance, and should be treated as such."

Guaranteeing the payment of mortgages bears a close analogy to credit insurance, and to fidelity insurance as practiced by corporate sureties for profit. See Town of Whitestown v. Title Guaranty & Surety Co., 72 Misc. Rep. 498, 131 N. Y. S. 390, affirmed 209 N. Y. 512, 102 N. E. 1115; State v. Chicago Bonding & Surety Co., 279 Mo. 535, 215 S. W. 20; Young v. Am. Bonding Co., 228 Pa. 373, 77 A. 623; Philadelphia Casualty Co. v. Fechheimer, 220 F. 401, 417, Ann. Cas. 1917D, 64 (C. C. A. 6). If the sole service rendered by a corporation consisted in guaranteeing the payment of mortgages upon application by the mortgagees, it would seem to us perfectly clear that the business was truly "insurance." See People v. Potts, 264 Ill. 522, 528, 106 N. E. 524.

What raises doubt in the case at bar is the fact that, although true insurance is involved, the service rendered by plaintiff is not the guaranteeing of mortgages already owned by the applicants for such guaranty, but may be argued to be the procuring for

132 the investing public of sound investments, which incidentally include plaintiff's guaranty. Which is the dominant and which the incidental feature of the business? In the case of one who trades in mortgages, the profit in the transaction is expected to come from the spread in purchase and sale prices. This is not true of plaintiff's business. Its primary purpose in acquiring and disposing of mortgages is not to invest its funds or to sell the mortgages at a profit, but is to dispose of them at their face value accompanied by its guaranty; and it is from the "premium" for such guaranty, together with the fees previously collected from the mortgagor upon the making of the bond and mortgage, that plaintiff's profit is derived. Such fees cover charges for searching the title, and for inspecting and appraising the property, etc. The fees for title examination may be considered as the premium for the guaranty of title contained in the policy that is subsequently to be issued upon plaintiff's disposal of the bond and mortgage. This is none the less title insurance because the word "guarantee" rather than "insure" is used. See Title Ins. & Trust Co. v. City of Los Angeles, 61 Cal. App. 232, 214 P. 667. Nor does it matter that the insurance is paid for by one who is not the insured. The fees for inspections, appraisals, etc., may be considered as an incident to the insurance of the mortgage, for it is not an unreasonable incident to the business of guaranteeing mortgages that the insurer should investigate and appraise the property it is to insure. Despite the mounting size of such fees, we think they remain an incident to the guaranty of the mortgage, unless that guaranty itself is to be deemed but incidental to a business of investing in and selling mortgages. In determining which way the business should be viewed, the case of United States v. Cambridge Loan & Bldg. Co., 278 U. S. 55, 49 S. Ct. 39, 73 L. Ed. 180, becomes apposite. There a corporation which by the State law was a building and loan association had power to receive deposits from and make loans to persons who were not members, and the Federal tax officials contended that the exercise of such powers made it in substance a banking institution rather than a "building and loan association" within the exemption from income tax granted by section 231 of the Revenue Acts of 1918 and 1921 (40 Stat. 1076, 42 Stat. 253). But the argument was rejected on the ground that in exempting such associations Congress was speaking of existing societies that commonly were known as such, so that the term included what the States were content to recognize as building and loan associations, unless there was a gross misuse of the name. In the case at bar the State has classified the business done by plaintiff as insurance, though not with absolute consistency, since banking corporations may also sell mortgages with their guaranty. Nevertheless, it has accepted plaintiff as an insurance company and subjects it to supervision by the department of insurance. The departure from insurance is surely no greater than was the departure from the normal business of loan associations in

the Cambridge case. This recognition by the State of the nature of plaintiff's business should turn the scales, if the question hangs in doubt. In our opinion the plaintiff should be deemed an "insurance company" subject to tax under section 246.

There is advanced a further argument against this conclusion based upon the contention that what Congress regarded as an insurance company is indicated by its definition of "gross income" set forth in section 246 and by the deductions therefrom permitted by section 247. It is argued that gross income is to be "computed on the basis of the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners," and that, since no form for an "annual statement" for title and mortgage guaranty companies was approved by the National Convention until long after the taxable years in question, Congress can not have intended to include such corporations within the section. This argument, however, proves too much; for it would exclude companies engaged solely in insuring titles, although such companies are concededly taxable under section 246. See Sol. Mem. 5501 V–1 C. B. 102; G. C. M. 5355 VII–2 C. B. 160. Although section 246 (b) (1) refers to the form of annual statement approved by the National Convention of Insurance Commissioners, other subdivisions of the section proceed to specify how gross and net income are to be computed, so that the absence of such an approved form of annual statement would seem unimportant. See Massachusetts Protective Ass'n v. Commissioner, 18 B. T. A. 810; Western Casualty Co. v. Commissioner, 20 B. T. A. 738.

Moreover, the National Convention has approved forms for
133 "miscellaneous insurance companies," and it is by no means clear that title and mortgage guaranty companies could not fall within this classification. It is said further that not all of plaintiff's income can be classified as "investment income" or "underwriting income" as defined in said section 246, so that our conclusion will result in a large part of its income escaping taxation. This argument rests chiefly upon the premise that the income derived from guaranteeing mortgages can not be deemed "underwriting income" and in the view we take this premise is false. Even if the incidental fees collected for inspections, appraisals, etc., would escape taxation (as to which we express no opinion), it does not follow that plaintiff is not an insurance company within the meaning of section 246. It was not until 1928 that Congress added to the computation of income of insurance companies, other than life or mutual, gain derived from the sale of property (45 Stat. 844, § 204 (b) 1, 26 U. S. C. A. § 2204), yet it could scarcely be maintained that prior to 1928 such companies, if they had any income of this type, were to be excluded from taxation as insurance companies. Cf. John Hancock Mut. Life. Ins. Co. v. Commissioner, 10 B. T. A. 736; Independent Life Ins. Co. v. Commissioner, 17

B. T. A. 757; Massachusetts Protective Ass'n v. Commissioner, 18 B. T. A. 810.

The question presented by this appeal appears to have been presented to the courts in but three other cases. In Lawyers' Mortgage Co. v. Bowers, 34 F.(2d) 504, which we have this day affirmed 49 F.(2d) ——, the District Court decided in favor of the taxpayer. In Louisville Title Co. v. Lucas, 27 F.(2d) 413 (D. C. W. D. Ky.), and Title Guarantee & Trust Co. v. United States (D. C. S. D. Cal.) 49 F.(2d) ——, decided April 29, 1931, the Government prevailed. The latter of these two cases may be distinguished upon its facts, but the former must probably be admitted to be inconsistent with the conclusion we have reached. It should be noted, however, that it was decided prior to the Supreme Court's opinion in United States v. Cambridge Loan & Bldg. Co., supra.

Judgment reversed.

134 In United States Circuit Court of Appeals, Second Circuit

HOME TITLE INSURANCE COMPANY, PLAINTIFF-APPELLANT

v.

UNITED STATES, DEFENDANT-APPELLEE

Judgment

Filed June 8, 1931

Appeal from the District Court of the United States for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

WM. PARKIN, *Clerk.*

135 [File endorsement omitted.]

136 [Clerk's certificate to foregoing transcript omitted in printing.]

137 Supreme Court of the United States

Order allowing certiorari

Filed October 26, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And

it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:] Enter Attorney General. File No. 36170. U. S. Circuit Court of Appeals, Second Circuit. Term No. 356. The United States of America, petitioner, vs. Home Title Insurance Company. Petition for writ of certiorari and exhibit thereto. Filed September 5, 1931. File No. 36170.

U. S. GOVERNMENT PRINTING OFFICE: 1931